



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
MISC. APPLICATION NO. 170 OF 2013

KENYA ORIENT INSURANCE LTD.....CLIENT/APPLICANT

VERSUS

MURI MWANIKI & WAMITI ADVOCATE.....ADVOCATE/RESPONDENT

R U L I N G

This is a ruling on four (4) applications in High Court Misc. Applications No. 170, 171, 172 and 173 all of 2013. It was agreed by the parties that the applications dated 12/9/2014 be heard and determined together.

The parties also agreed that the applications be determined by way of written submissions which were dutifully filed by the counsels for the parties. The applicant was represented by Munene Wambugu & Kiplagat Advocates while the respondent's firm of Muri Mwaniki & Company represented itself.

The facts leading to these applications are that on the 24/4/2012 the advocates sent a fee note to the client intimating that his fees in respect of the matter giving rise to this proceedings were KShs.67,214/=. At the footnote of the fee note contained the following notice:-

NB: If payment of this fee note is not received within thirty (30) days from the date hereof the firm is entitled, without any prejudice to any other rights, to charge interest as provided in the Advocates Act (Cap 16, Laws of Kenya).

Upon receipt of the fee note the client paid KShs.49,648/= vide cheque dated 29/5/2012 which amount was received. Thereafter, the advocate filed a bill of costs for taxation. It is on the backdrop of the bill of taxation that this application was filed seeking to strike out the said bill.

The applicant argues that having raised his fees at KShs.67,214/= and having received partial payment of the said amount, the advocate is *inter alia* estopped from proceeding with taxation of the bill of costs.

In the supporting affidavit of Roselyne Kihara it is deponed that the correspondence exchanged in April and May 2012 demonstrate an agreement as to the fees that were demanded by the advocate and paid by the client and the same cannot be subjected to taxation. That the advocate did not comply with the provisions of Section 48 of the Advocates Act in that he failed to send to the client a summarized bill one month before institution of the proceedings. The applicants argues that the bill of costs is frivolous, vexatious and amounts to an abuse of the process of the court and ought to be struck out.

In the replying affidavit of Njuguna Muri it is stated that the respondent's advocate forwarded a fee note to the client dated 24/4/2012. The fee note annexed to the supporting affidavit of the client has several alterations made by hand yet the client proceeded to make payment without seeking clarification. The advocate later informed the client that some of the unpaid or partially paid fee notes were disputed and that the advocate was proceeding to have the fees assessed by way of taxation.

It is further argued that it is not correct that the advocate had indicated that the fee note represented the final fees and payment. The advocates' fees had not been paid and remains outstanding to date. The notice dated 1/8/2013 was categorical that the failure to settle the fee in full rendered the same as disputed and open to assessment through taxation under Schedule V part II of the Advocates Remunerations Order.

In support of its argument that there existed an agreement, the client relied on the case of **ASAPH GATHUNGU MUTI VS KENYA FINANCE CORPORATION & ANOTHER HCCC NO. 199 OF 2003** where the court held that if a man either by express terms or through his conduct makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in that way, in belief of such state of facts to the damage of him who believes and acts, the first is estopped from denying the existence of such facts.

The respondent submitted that Section 48 of the Advocates Act is not restrictive but optional to this case. The act of the respondent in filing the bill of costs for taxation is covered by Section 48(3) of the Act which provides that an advocate-client bill of costs can be taxed without the need to file a suit.

It was further argued that the application is meant to delay the fair assessment of the advocates fees and conclusion of a matter which was delayed over 10 months and it is meant to deny the advocates their legal fees.

Section 48 of the Advocates Act provide:-

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.*

The respondent relied on the case of **LUBULELLAH & ASSOCIATE ADVOCATES VS N.K. BROTHERS LIMITED Misc. Civil Application No 52 of 2012** the court held that while Sections 48 and 49 of the Advocates Act demand that a suit be filed and a decree be issued before an advocate can execute for cost, it is important to note that those are not the only sections under which an advocate can claim for costs. An advocate has an option of either filing a bill of taxation where upon a certificate of costs is issued pursuant to Section 51(2) of the Advocates Act or file a suit under Section 48(1) of the Act.

It is clear from the provisions of Section 48 that an advocate has the option of sending a bill of costs to his client and if it is not settled within one month, he can apply for taxation even before filing a suit for recovery of the costs. The respondent relied on the case of **PETERSON KINYUA KIAM T/A KINYUA KIAMA & CO. ADVOCATES VS JOSEPHINE NJERI NO. 193 OF 2013** where the court confirmed this position that an advocate is not subjected to the provisions of Section 48(3).

The issue whether there was an agreement between the advocate and the client in regard to the fees demanded will be determined by looking at the fee note itself and the correspondences exchanged between the parties. There is nothing on the fee note indicating that it contained the final fees. If there

was any agreement between the client and the advocate, it would be expected that the same would be in writing and signed by both parties. No such agreement has been produced by the applicant. The applicant has failed to satisfy the court that there was any agreement on the fees charged between the parties.

The other issue is whether the bill of costs filed by the advocate capture the amounts paid by the client. On perusal on the bill of costs, it is noted as follows:-

- (a) *Item 107 in Misc. Application No. 170, captures the amount of 49,698/=.*
- (b) *In. Misc. 171 items 85 shows Shs.37,948/= was paid for a fee not of Shs.67,214/=*
- (c) *In Misc. No. 172 item 130 shows Shs.111,330/= was paid for a fee note of Shs.127,776/=*
- (d) *In Misc. No. 173 item 131 shows 49,698/= was paid out of a fee note of Shs.60,243/=*

The client annexed a fee note which had several alterations. It was not explained in the supporting affidavit who was responsible for the alterations and at what stage they were done. However, the advocate attributes the alterations to the client who attempted to negotiate the fees. Some fee notes reflected two different amounts as due and payable. The advocate annexed different fee notes dated 24/4/2012 for 67,214/= which had no alterations. The client paid lump sums to offset the outstanding fees through different cheques dated 29/5/2012 which amounts have been taken into account in the bill of taxation.

It has been denied that the fee notes sent to the client were indicative of the final fees and payments. The advocate complains that the balance of the fees were not paid within 30 days as required by the notices.

In my opinion, the applicant has not demonstrated as to why the advocate should be prevented from taxing the bill of costs considering that the firm is entitled to its legal fees. It is not denied by the applicant that he failed to clear the whole amounts in the fee notes. The applicant was therefore bound by the notice which made interests on the unpaid sums chargeable. There is no evidence that the client sought for any clarification on the details of the fee notes from the advocate before making the partial payments.

As I have already pointed out, the issues in the four applications are similar. The fee notes annexed by the client reflect different amounts in some cases and contain unexplained alterations. The bills of costs for taxation have captured all the amounts paid by the client. The respondent does not dispute the amounts paid in each of the matters. By a notice dated 1/8/2013 the applicant was notified by the respondents that due to failure to settle the fees or due to partial settlements, the fee notes were deemed disputed and that the respondent would proceed to have them taxed in court.

The serving of the notice which is not denied dislodges the application of the principle of estopped on part of the advocate.

It is my considered opinion that these applications are not merited and are hereby dismissed with costs.

DELIVERED, SIGNED AND DATED AT EMBU THIS 16TH DAY OF JUNE, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Kiplangat for Applicant

Mr. Ithiga for Kageni for Respondent