



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 105 OF 2012

WILFRED NYAUNDI KONOSI T/A KONOSI

& COMPANY ADVOCATES.....APPELLANT

VERSUS

JOHN LOKORIO.....RESPONDENT

(Appeal from the Ruling and Order of Mr. J. Njoroge, Senior Principal Magistrate dated 23rd April 2011 in Nakuru CMCC No. 439 of 2011 Between Wilfred N. Konosi t/a Konosi & Company Advocates and John Lokirio)

JUDGMENT

1. The subject matter of the Appeal hereof arises from an Advocate-client certificate of costs issued by the Taxing Master in respect of services rendered by the appellants to the client, the Respondent in **Nakuru HCCC No. 19 of 2006**. The background of the matter is straight forward.

That on 24th September 2001 the Advocates were instructed by the Respondent hereof to take over the conduct of the above case from the firm of **M/s G.N. Nyongesa & Company Advocates**.

A Notice of change of Advocates was filed and services were rendered by the Advocates.

On the 4th July 2009 the respondent instructed another firm of Advocates to take over the conduct of the matter from the above advocates. **M/S Karanja-Mbugua & Co Advocates** likewise came on record for the Respondent.

Following the change of Advocates, the Appellant, **M/S Konosi & Co Advocates** filed an **Advocate-client Bill of Costs in High Court Misc. Application NO. 350 of 2009** and the Bill was taxed, and a certificate of costs issued in the sum of Kshs.231,813.50.

2. The Respondent was dissatisfied with the taxation and filed a Reference to the Judge by his application dated 9th July 2009 through the firm of M/S Karanja-Mbugua & Company Advocates. When the reference came up for hearing on the 9th February 2011, the two firms of Advocates recorded a consent order that reduced the taxed costs to Kshs.200,000/= to be paid within 60 days from that date.

An amended certificate of costs was issued and served upon the Respondent who failed to pay.

3. To enable the Appellant recover the costs as per the certificate of costs, he filed a recovery suit in the Chief Magistrate's Court being **Nakuru CMCC No. 439 of 2011**.

In his prayers, he sought payment of the Kshs.200,000/= together with interest at 14% per annum from the 16th November 2007 until payment in full and costs of the suit. The firm of M/s Karanja-Mbugua & Company Advocates appeared and filed a defence on behalf of the Respondent and in his defence dated 17th July 2011 raised issues that the Advocates were not entitled to the legal fees of Kshs.200,000/- or any interest, and that the advocates had no capacity or any qualifications or competence to represent the client (defendant) in the suit **Nakuru HCCC No. 19 of 2006** subject of the Advocate-Client certificate of costs.

4. Issues of retainer and lack of instructions were raised. In its application dated the 25th July 2011 the Appellant sought that the defence as filed be struck out as being an abuse of court process and that judgment be entered for the plaintiff-(Appellant) as prayed in the plaint.

The application was argued and on the 23rd April 2011, the trial magistrate disallowed the application stating that the defence raised triable issues as follows:

- (a) Whether the firm of G.C Nyongesa had capacity to appear
- (b) Whether the plaintiff had capacity to represent litigants including the respondent.
- (c) Whether the plaintiff merits the sum in question
- (d) If not whether any other advocate merits the payment.

The appellant being dissatisfied with the ruling lodged the appeal hereof.

5. The grounds of appeal as preferred by the Appellant are reproduced herebelow:

1. THAT the learned trial Magistrate erred in law and in fact in holding that the Defence filed by the Respondent in the lower court raised triable issues.
2. THAT the trial Magistrate erred in law and in fact in holding that whether the firm of G.C Nyongesa had capacity to appear, whether the Appellant had capacity to represent litigants including the Respondent, whether the appellant merits the sum in question and if not whether any advocate merits the payment were triable issues, challenging the validity of the consent order recorded in **Nakuru H.C. Miscellaneous Civil Application No. 350 of 2009**.
3. THAT the learned trial magistrate erred in law and in fact in failing to consider the fact that a Certificate of Costs issued by the taxing officer by whom any bill has been taxed, unless set aside or altered by the court, shall be final as the amount of the costs covered thereby given the fact that a consent on costs was recorded on a reference to the Judge.
4. THAT the learned trial magistrate erred in law and fact in failing to hold that the Defence filed by the Respondent was an abuse of the process of court.
5. THAT the learned trial magistrate erred in law and in fact in not holding that the Appellant was entitled to interest at 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, provided that such claim for interest is raised before the mount of the bill has been paid or tendered as provided for by Rule 7 of the Advocates (Remuneration) Order when there was clear evidence before him to that effect.

6. THAT the trial magistrate failed to analyze the facts before him as he was duty bound to do under law in dispensing justice and thus occasioned the Appellant a miscarriage of Justice.

7. THAT the learned trial magistrate erred in law and in fact in not considering the fact the Respondent had not filed any replying affidavit or complied with the provisions of **Order 7 Rule 5 Of The Civil Procedure Rules**.

8. THAT the learned trial magistrate in failing to uphold the overriding objectives of the Civil Procedure Act in facilitating the just, expeditious proportionate and affordable resolution of the matters in dispute before him.

The appellant has proposed only one issue for determination, and I add, it carries within it all other issues as forming part and parcel of the appeal.

Whether the trial magistrate was right in dismissing the appellants application dated 25th July 2011.

6. The appellants submissions:

The appellant submitted that the recovery suit of its costs in the lower court was proper and competent and ought not have been challenged as it was based on a certificate of costs issued by the taxing master after taxation, and upon the Respondent filing a Reference to the Judge, a consent order was recorded between the Advocates and the Respondents Advocates now on record. It was his submission that the consent order not having been set aside or varied is not subject to challenge as it is final and therefore the trial magistrate erred in law and fact by holding that the defence filed by the Respondent ought not be struck out, as it raised issues for trial.

In support, the appellant sought guidance from several decisions, among them.

Ahmednasir Abdikadir & Co. Advocates -vs- National Bank of Kenya (2007) KLR where the court held that a recovery suit for advocates costs based on a certificate of costs is not a suit to assess the costs or to tax a bill in terms of **Section 51 of (2) as read with Section 49 of the Advocates Act**.

7. The court further went ahead to state that issues which ought to have been raised and determined upon an objection or reference in the High Court and or appeal to the Court of Appeal under **Section 11 of the Advocates (Remuneration) order**, ought not be raised in the recovery suit, such as validity of the certificate of costs retained or of the taxation proceedings. See also **Kenyariri & Associates Advocates (2015) KLR**

To expand on the above, the appellant submitted that the firm of G.C Nyongesa & Co. Advocate was not claiming any costs from the Respondent. That the respondent is a beneficiary of the services rendered by the firm of **Konosi & Co. Advocates (Appellants)** and and the current advocates, **Karanja-Mbugua & Co. Advocates**.

8. The Respondents Submissions

It was submitted for the Respondent that the defence in the recovery case raises trial issues and as such the defendant/respondent ought to be allowed to defend the suit. It was his submission tht Mr. G.C. Nyongesa advocate who instituted the proceedings had no practicing certificate but that before the Reference was heard by the Judge, a consent was recorded, and that appellant should have applied to execute for the costs instead of filing the recovery suit exposing itself to the defence as filed, and therefore the trial magistrate did not err in anyway in holding that there were triable issues. He urged the court to disallow the appeal.

9. Analysis and findings

The court has considered the rival arguments.

There is no dispute that the appellant holds a certificate of costs arrived at by consent of both parties herein in a reference to this court. There is also no dispute that the consent certificate of costs has not been varied or set aside, nor would there be any challenge if judgment and decree were applied for within the same **Misc Civil Application No.350 of 2009** in which the certificate of costs was obtained.

10. The court fully agrees with the Respondents submissions that the appellant should have moved to obtain judgment and decree for execution purposes within the application that gave rise to the certificate of costs.

Section 51(2) of the Advocates Act states:

“The certificate of taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as the amount of the costs covered hereby, 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.”

11. The finality of a certificate of taxation can therefore not be challenged in a civil suit. I have perused the proceedings. I find no dispute as to retainer, as demonstrated by the consent order recorded in court by counsel for both parties.

In **Kilonzo & Co Advocates -vs- Hon. John Njenga Mututho (2012) KLR** the Hon. Justice Odunga, faced with a matter closely similar to the current one where a recovery suit for advocates costs based on a certificate of costs, issued by the taxing officer, and where the Respondent filed a defence, had this to say:

“As long as the certificate of costs as well as the decree remain undisturbed and as the retainer is not undisputed, it would be an uphill task for the defendant to satisfy the court that the intended defence is prima facie merited since this court cannot in these proceedings be expected to set aside judgment arising from the said proceedings----”

In these circumstances the respondent cannot have a valid defence since the matter involves and Advocate-client bill of Costs which was taxed and completed by issuance of the consent certificate of costs in the sum of Ksh.200,000/=.

Needless to say that the said certificate can therefore not be challenged in the recovery proceedings giving rise to the ruling subject of the appeal.

12. Coming back to the recovery suit- **CMCC No. 439 of 2001** and the application dated 25th July 2011 seeking orders to strike out the defence, it is noted that the defendant in opposing the application did not file a replying affidavit save for grounds of opposition dated the 28th November 2011 pursuant to **Order 51 Rule 4(c) Civil Procedure Rules**. It is my view that grounds of opposition addresses only issues of law and no more. The said grounds consists of averments of facts of general nature.

In his arguments before the trial court, the respondent's advocate brought issues of facts which other than stating, did not tender any proof. To that end they remained mere statements of no evidential value. See **Order 2 Rule 11 of the Civil Procedure Rules and Evidence Act, Sections 107, 108 and 109**.

In **Meraka & Co. Advocates -vs- Invesco Assurance Co. Ltd (2015) KLR**, Judge Mabeya

held that grounds of opposition addresses only issues of law and no more.

That what was deponed in the affidavit in support of the application (as in the present case) was not rebutted by the Respondent by way of a replying affidavit.

13. In the absence of rebuttal of the averments in the the supporting affidavit, it means that the respondent has no plausible claim against the applicant. Borrowing from the Learned Judges holding, I find that the trial magistrate had no legal basis upon which he dismissed the appellants application to strike out the defence and enter judgment accordingly as prayed in the said application. Decided authorities on this subject are numerous. I need not state all of them.

14. Having analysed the submissions by both counsel and the legal provisions governing an Advocate-client bill of costs, this court finds and hold that:

(1) A certificate of costs, arising from a taxation before a taxing master, and the certificate of costs being by consent of both the client upon a Reference to the Judge, it cannot be challenged unless it is set aside or varied by a court order.

(2) That the Advocate may opt to recover the said taxed costs within the **Misc. Application** giving rise to the certificate of costs by way of summary manner, by application for judgment based on the certificate of costs, or by filing a recovery suit against the respondent and applying for summary judgment thereof based on the certificate of costs – as provided under **Section 51 (2) of the Advocates Act**.

(3) That as long as the certificate of costs is unchallenged as is in this appeal, (a consent certificate of costs having been recorded on a Reference) there can be no valid defence challenging the validity or otherwise of the certificate of costs, more so where the certificate was obtained by consent of both parties.

(4) That once a certificate of costs is issued and has not been set aside or altered, no other action would be required from the court save to enter judgment upon application.

15. For the above reasons, and having considered the pleadings, the written and oral submissions, case law and authorities relied upon by both parties, the court finds that the appellant should not be denied its hard earned fees.

Consequently, the appeal is allowed, and the ruling and order issued in **Nakuru CMCC No. 439 of 2011** on the 23rd April 2012 dismissing the application dated 25th July 2011 is set aside, and substituted with an order allowing the said application in terms of prayer 2, that the statement of defence dated 19th July 2011 is struck out and Judgment is hereby entered for the (plaintiff) appellant as prayed in the plaint dated 26th May 2011.

The Respondent shall bear costs of the appeal.

Dated signed and delivered in open court this 16th day of December 2015

JANET MULWA

JUDGE