



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. APPLIC. NO.206 OF 2013

IN THE MATTER OF OBAGA & COMPANY, THE ADVOCATE

AND

IN THE MATTER OF TAXATION OF ADVOCATE/CLIENT BILL OF OCSTS

BETWEEN

OBAGA & COMPANY ADVOCATES APPLICANT

VERSUS

ABDALLAH ISSA TIMAMY

T/A TIMAMY & COMPANY ADVOCATES RESPONDENT

JUDGMENT

1. The application for determination herein is the one dated 28th November 2013 brought pursuant to **Order 51 (2)** of the **Advocates Act (Cap 16)** praying that judgment be entered for the Applicant/Advocate in accordance with taxed costs herein together with interest thereon. The amount in issue is Kshs. One Hundred and Sixty Five Thousand and Twenty Eight (Kshs.165,028/=) which amount the applicant prays be adopted as judgment and decree of the court together with interest thereon from the date of raising the bill/fee note on 26th day of June 2007 till payment in full. The advocate also prays that the applicant be at liberty to execute against the respondent. The application is premised on the grounds set out on the face of the application and supported by the affidavit of Rose Obaga, an Advocate of the High Court of Kenya and the sole proprietor of the firm of Obaga & Company Advocates the applicants herein.
2. In the affidavit she deposes that her firm was instructed by the firm of M/s Timamy & Co. Advocates to act for them on behalf of their client Kipkebe Limited as the Principal Client in Kisii High Court Civil Appeal NO.76 of 1997 between Bernard Barongo Mekubo and Kipkebe Limited.
3. On the said instructions, her firm did conduct the appeal applications, prepared and served the pleadings and court documents, court attendances and successful prosecution of the appeal on behalf of the said advocates. She deposes that professional service was rendered on behalf of the said firm in the said suit as instructed. Thereafter on the 26th June 2007, the Advocate did render her bill/fee note for work done but the respondent failed to pay the same thus prompting her to file and tax the bill of costs dated 10th September 2013.
4. The bill was taxed at Kenya Shillings One Hundred and Sixty Five Thousand and Twenty Eight (Kshs.165,028/=) and the same has not been altered and/or varied. She maintains that on the 3rd day of December 2009 the court in **Kisii vide High Court Misc. Cause No.9 of 2008 – Obaga -**

- vs- Kipkebe Limited** ordered that costs before the 20th day of July 2005 be borne and/or paid by the Respondent. She contends that the retainer is not disputed.
5. The application is opposed vide the following four (4) grounds:-
 1. *The application is incompetent, misconceived and an abuse of the court process and the respondent shall at the first instance apply for its dismissal.*
 2. *The applicant's claim of interest from the date of raising her fee note on 26th June 2007 is unfounded.*
 3. *There is no proof of service of the certificate of costs hence the court ought to disallow this application.*
 4. *Any execution against the respondent will amount to executing tools of trade of the respondent which is contrary to the law.*
 6. When the matter came up for hearing on 12th May 2014, parties agreed that application Nos.206, 208 and 209 be consolidated with the instant application for the purposes of this hearing.
 7. The court was addressed on the application by Miss Obaga for the applicant and Mr. Mulandi for the respondent. **Section 51 (2)** of the **Advocates Act** provides as follows:-

“The certificate of the taxing master 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.”

8. Mr. Mulandi relied on the grounds of opposition to oppose the application. He submits that the fee note of 2007 is not part of the application and there is no proof of service of the said fee note.
9. He maintains that **Section 51 (2)** of the **Advocates Act Cap 16** has no provision for interest and **Section 44 (1)** of the **Civil Procedure Act** provides that any execution against law is contrary to the above cited law.
10. Ms Obaga maintains that no reference has been filed in respect of the certificate of costs. She argues that there is no dispute or objection to the relationship or retainer and adds that Advocates are, under **Rule 7** of the **Advocates Remuneration Order**, empowered to charge interest and disbursement before bill is paid in full.
11. Miss Obaga also submits that there are no other conditions to be fulfilled by an applicant before making an application and further that execution can be done by a law firm. Lastly she submits that there is no replying affidavit and so the facts of this application remain intact and uncontroverted.
12. The first issue to be determined is whether there was a relationship between the parties herein or a retainer for that matter. A retainer need not be in writing, See **Ahmednasir Abdikadir & Co. Advocates -vs- National Bank of Kenya Ltd [2007] e KLR** for the proposition that where there is no written retainer, the court may imply the existence of a retainer from the acts of the parties in the particular.
13. In my view, whether or not the respondent retained the applicant to act for him in **Kisii High Court Civil Appeal No.76 of 1997** is a matter of fact. It can only be ascertained through the calling of evidence. In the instant case, an affidavit was sworn by an advocate who is actually the proprietor of the law firm which the applicants say was instructed to act for the respondent. No replying affidavit was sworn to rebut this or at all. In other words retainer was not disputed. It could not be disputed through grounds of opposition because the same was not evidence.
14. In any case the respondent lost the opportunity to challenge retainer when a demand for fees was made to him and when he was served with a bill of costs and invited to the taxation. Further, when he learnt of the certificate of costs he had an opportunity to seek reference or stay. He did not do so.
15. The certificate herein has not been set aside or altered by the court. It is therefore final to the amount of costs covered thereby.
16. In short, there is an unchallenged certificate of costs and this court has no option but to enter judgment in its terms. The application dated 28th November 2013 is therefore allowed with costs. The ruling herein will with necessary changes also apply to **Applications Nos.208 and 209 of 2013** where I enter judgment for Kshs.243089/= plus costs and interest and Kshs.144007/= plus

costs and interest respectively.

Dated and delivered at Kisii this 6th day of August, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Momanyi for Obaga for Applicant.

N/A for Respondent

Mr. Bibu - Court Assistant