



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC.APP.NO. 62 OF 2018

IN THE MATTER OF THE ADVOCATES ACT

BETWEEN

GACHIRI KARIUKI t/a GACHIRI KARIUKI & CO. ADVOCATES.....APPLICANT

VERSUS

INVESCO ASSURANCE CO .LIMITED.....RESPONDENT

RULING

1. The application is dated the 2nd October, 2018 and is brought under the provisions of Section 51(2) of the Advocates Act, paragraph 6 of the Advocates Remuneration Order, Section 3 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules; the applicant seeks the following orders;

(i) That judgment be entered for the applicant against the respondent for the sum of Kenya Shillings One Hundred and Twenty Three Thousand, Nine Hundred and Seventy Eighty (KShs.123,978/-) plus interest thereon at 12% per annum from the 6th day of September, 2013 until payment in full;

(ii) The costs of the application be provided for and be paid by the respondent.

2. The applicant relies on the grounds on the face of the application and on the Supporting Affidavit made on the same date by **RAHAB W. MUCHAI ADVOCATE** who deponed that the Bill of Costs dated the 22/05/2013 was served on the respondent and when it failed, neglected and refused to settle the fees the applicant proceeded to have it taxed on the 10/07/2013 against the respondent for the sum of KShs.123,978/- and a Certificate of Costs was issued on the 10/07/2018;

3. The applicant submitted that the application was uncontested and that no appeal has been filed or the Certificate of Costs set aside and therefore prayed that judgment be entered as prayed;

ISSUES FOR DETERMINATION

4. After reading the Supporting Affidavit and the Replying Affidavit filed herein by the respective counsel this court finds two issues for determination which are;

(i) Whether the Consent Letter was adopted as an Order of the court;

(ii) Whether the conditions of Section 51(2) of the Advocates Act have been satisfied by the applicant;

ANALYSIS

Whether the Consent Letter was adopted as an Order of the court;

5. The respondent was duly served with the application and it entered appearance and duly filed a response to the same; despite having taken the date in court the respondent was not in attendance on the date set for hearing of the application; which the application then proceeded as scheduled and was therefore unchallenged;

6. The above notwithstanding this court has had the occasion to peruse the court record and in particular the Replying Affidavit filed by the respondent and notes that the annexure 'PM2' is a consent letter dated the 9/12/2015 that reads as follows;

“By Consent:

1. That this matter be and is hereby marked as settled with no order as to costs.”

7. The consent letter is in respect to Misc.52 of 2013 and the Bill of Costs and the Certificate of Costs are titled likewise which leads this court to the presumption that the three documents relate to the same subject matter which is the costs; and in the averments the respondents counsel admits to having inadvertently failed to file the Consent Letter;

8. Indeed, it is fitting to comment here, that the Consent Letter does not bear the stamp of the court and neither was it produced to the Taxing Master to be adopted as an Order of the court; had any of the aforesaid actions been taken then this court would have been obliged to decide on the question of whether the consent/agreement fell within the ambit of the provisions of Section 45 of the Advocates Act and whether it should be upheld; and in upholding it this court would have adopted the contents of the Consent Letter and would have disallowed this instant application;

9. For those reasons this court is satisfied that the Consent Letter was not adopted as an Order of this court.

Whether the conditions of Section 51(2) of the Advocates Act have been satisfied by the applicant:

10. This court reiterates that the application proceeded for hearing in the absence of the respondent; no appeal has been filed nor the Certificate of Costs set aside;

11. In the circumstances this court can only consider the applicant's submissions; the applicable law is found at Section 51(2) of the Advocates Act which reads 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.”

12. This section gives this court the jurisdiction to enter judgment provided the Bill of Costs has been taxed and the taxing master has issued a Certificate of Costs; in this instance this has been done and the certificate has not been appealed against, set aside or varied; as stated earlier the date set for the hearing of the application that is the 17/06/2019 was taken in court in the presence of both counsel for the applicant and the respondent; on this date the counsel for the respondent was not in attendance at the hearing to oppose the application and to address any disputes relating to on the Consent Letter; and the matter proceeded for hearing in his absence;

13. In the light of the above this court is satisfied that from the material placed before it that all the conditions as set out in Section 51(2) of the Act have been satisfied and that this is a suitable case for it to exercise its discretion in favour of the applicant and therefore proceeds to enter judgment against the respondent for the certified sum; reference is made to the case **KTK Advocates vs Baringo County Government (2018) eKLR** where it was held that when ***“the two conditions are satisfied the court has the discretion to enter judgment for the sum certified due with costs.”***

FINDINGS AND DETERMINATION

14. In the light of the foregoing this court makes the following findings and determinations;

(i) This court finds the Consent Letter to be inadmissible.

(ii) This court finds that all the conditions set down in Section 51(2) of Advocates Act have been satisfied; the application is found to have merit and is hereby allowed;

(iii) Judgment is hereby entered in favour of the applicant against the respondent in the sum of Kshs.123, 978/-; no interest shall be applicable thereon.

(iv) Each party shall bear their own costs.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 14th day of November, 2019.

HON. A. MSHILA

JUDGE