



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 486 of 2012

E. W. NJERU & CO.....APPLICANT

VERSUS

ZAKHEM CONSTRUCTION (K) LIMITED.....RESPONDENT

RULING

1. The Applicant's Notice of Motion application dated 5th February 2013 was brought under the provisions of Section 51 (2) of the Advocates Act. It sought the following orders:-

a. **THAT judgment be entered for the Applicant against the Respondent in the sum of Kshs 577,460/= being taxed and certified costs due to the Applicant arising out of acting for the Respondent in Milimani High Court Civil Case No 592 of 2000 together with interest thereon from 15th December 2012.**

b. **THAT the costs of this application be paid by the Respondent.**

1. The grounds on which the Plaintiff relied on in support of its application were as follows:-

a. **THAT Applicant's advocates/client's bill of costs dated 2nd August 2012 was taxed on 29th November 2012 and a Ruling delivered on 14th December 2012 in which the said costs were taxed in the sum of Kshs 577,460/= all inclusive and a Certificate of Taxation dated 23rd January 2013 had been issued to that effect.**

b. **THAT after the Ruling on the taxation on 14th December 2012, the Respondent sought and was granted a stay of the said Ruling for 21 days.**

c. **THAT on 23rd January 2013, the Respondent was served with the Certificate of Taxation and a demand for payment of the same, but it has failed to pay the amount of Kshs 577,460/= or any part thereof.**

d. **THAT the Certificate of Taxation dated 23rd January 2013 had not been altered or set aside.**

e. **THAT it was fair and just to grant the orders sought.**

1. Eunice Wanja Kibe, an advocate in the Plaintiff's firm of advocates swore an affidavit on 5th February 2013 in support of the Plaintiff's application.

2. She explained that the Plaintiff filed the Bill of Costs dated 2nd August 2012 after it disagreed

with the Respondent on the costs payable to it. All items in the Bill, other than the instruction fees, were taxed by consent and a ruling delivered for the aforesaid sum of money. The Certificate of costs was issued on 23rd January 2013 and served upon the Respondent on the same date. However, as at the time of filing the said application, the Respondent had not remitted the monies to the Applicant.

3. The deponent contended that the Certificate of Taxation had not been altered or set aside and that there was no application pending in court relating to the same. She attached copies of all the documents it was relying on in support of the Applicant's case as exhibits in her Supporting Affidavit.
4. In response thereto, the Respondent filed its Grounds of Opposition dated 11th March 2013 on 12th March 2013. The said grounds were as follows:-

i. THAT the application was fatally defective and offended the provisions of Section 48 of the Advocates Act Chapter 16 Laws of Kenya which made it mandatory that a suit be filed for recovery of costs.

ii. THAT the Advocate/Applicant failed to serve a thirty (30) day notice under Rule 7 of the Advocates Remuneration Order and therefore the Applicant was not entitled to claim any interest on the Certificate of Costs.

iii. THAT the court lacked the requisite jurisdiction to award interest on a Certificate of Costs under Section 51 (2) of the Advocates Act.

iv. THAT there was no evidence of Retainer, which was a condition precedent under Section 51(2) of the Advocates Act.

1. When this matter came for highlighting of the written submissions on 12th March 2013, both Mr Gachoka and Mr Issa for the Applicant and Respondent respectively informed the court that they wished that the submissions made in **HCCC Misc 487 of 2012 E.W. Njeru & Co Advocates vs Zakhem Construction (K) Limited** be adopted herein. It was agreed that any order applicable in that case would also apply in this case *mutatis mutandis*. The ruling herein is therefore on the basis of the submissions that were made **HCCC Misc 487 of 2012 E.W. Njeru & Co Advocates vs Zakhem Construction (K) Limited** as the matters involved the same parties and the same advocates.
2. In its submissions, the Applicant argued that since there was no reference that had been filed by the Respondent, this court had power to enter judgment in its favour as prayed in the application herein. It relied on **HCCC Misc No 841 of 11 Njonjo Okello & Associates vs Lalit Chandra PopetlalDoshi** in which Havelock J held that the court had jurisdiction to enter judgment where suit had not been filed for recovery of costs.
3. The Applicant submitted that save for the instruction fees, its Bill of Costs was largely taxed by the consent of the parties. It persuaded the court not to look at the technicalities of not having given a thirty (30) days notice of the Certificate of Taxation. It argued that Article 159 of the Constitution of Kenya, 2010 provided that courts should not determine matters based on technicalities.
4. In its submissions, the Respondent averred that the present application under Section 51 (2) of the Advocates Act was defective because no suit had been filed by the Applicant. The said section makes a general provision as to taxation and bills of costs. It was the Respondent's submission that Section 48 of the said Act dealt with recovery of costs through a suit filed by an applicant. The Respondent submitted that the proper procedure of how recovery of costs should be undertaken was a subject of division of many courts.
5. The Respondent relied on the case of **Sharma vs Uhuru Highway Development Ltd [2001] 2 EA** in which the Respondent therein sought to strike out the proceedings before the Taxing Master on the ground that the matter before the taxing master were improperly before him as no plaint had been filed in compliance with the mandatory provisions of the Advocates Act Cap 16. The Judge upheld the Respondent's application and struck out the said proceedings.
6. Being dissatisfied, the Applicant therein appealed against the decision of the said Judge. The

Court of Appeal held that the proceedings in the High Court were a nullity because there were no grounds conferring jurisdiction on the Judge to hear the matter and no steps had been taken to divest the deputy registrar of his jurisdiction.

7. I find that the cited case by the Respondent is distinguishable from this case as the taxing master had already taxed the Applicant's Bill of Costs and issued a Certificate of Taxation. The Taxing master was fully conferred with jurisdiction when he taxed the Applicant's Bill of Costs.
8. A reading of the Advocates Act provides for two (2) ways in which an applicant may recover its costs. These are under Section 48 and Section 51 (1) of the Advocates Act which I have found it necessary to reproduce to show the different approaches of recovery of costs by an advocate against his client.
9. Section 48 of the Advocates Act provides as follows:-

“(1) Subject to this Act no suit shall be brought for the recovery of any costs due to an advocates or his firm until after the expiry of one month after a bill of such costs, which may be in summarised form, signed by the advocate or 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 leave Kenya or abscond from the local limits of the Court’s jurisdiction, in which event any action may be commenced before the expiry of the period of one month.

1. Under Section 49 of the said Act, it is provided as follows:-

“Where in the absence of an agreement for remuneration made by Section 45, a suit has been brought by an advocate for the recovery of any costs and a defence is filed disputing the reasonableness or quantum thereof, no judgment shall be entered for the plaintiff, except by consent, until the costs have been taxed and certified by the taxing officer.”

1. It appears to me that if an applicant opts to proceed under Section 48 of the Advocates Act, he is required to proceed as follows:-

- a. **Deliver or send by registered post to his client, a Bill of Costs.**
- b. **Prepare the said Bill of costs which may be in a summarised form.**
- c. **The advocate or a partner in the firm must sign the Bill of Costs.**
- d. **Advocate or partner in the firm may bring suit for recovery of any costs after expiry of one (1) month after service of such Bill of costs**
- e. **Where the party chargeable therewith is about to quit Kenya or abscond from the local limits of the Court’s jurisdiction, the plaint should be accompanied by an affidavit verifying that, in which event action may be commenced before the expiry of the period of one (1) month.**
- f. **If there is no defence filed by a Respondent, the taxing master will tax the bill of costs and issue a Certificate of Costs.**
- g. **If there is a Defence, judgment can be entered by consent.**
- h. **If there is no such consent, the taxing master will tax the bill of costs and issue a Certificate of costs.**

1. 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 taxed amount of the costs recovered 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.”

1. The Applicant herein opted not to file a suit for recovery of its costs as provided for under Section 48 of the Advocates Act. It applied for taxation of its Bill of Costs in accordance with Section 51(2) of the said Act. The Applicant was therefore under no obligation to comply with the provisions of Section 48 of the Act by filing a suit for the recovery of its costs against the Respondent herein.
2. The Respondent’s counsel appears to have misinterpreted the full purport of Section 48 of the Advocates Act and the holdings of the Court of Appeal Judges in the **Sharma case** with whom I am in total agreement. The Court of Appeal was clear that an advocate who files a Bill of Costs for taxation need not file suit for the recovery of its costs against its client. It is for that reason that I will reject the Respondent’s arguments that the Applicant herein was obliged to file suit for recovery of costs and that an application that seeks to recover costs before a suit is filed is defective, premature and ought to be struck out.
3. In view of the fact that I was wholly in agreement with the holding of **Sharma case** and that this court is bound by the decisions of the Court of Appeal, I would therefore respectively hold a different view from Nyamu J (as he then was) in **Oruko & Associates vs Brollo Kenya Ltd [2003]1 EA**.
4. Section 51 (2) of the Advocates Act provides that “ **the certificate of costs shall be final as to the amount of costs and that 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 for the sum certified to be due with costs.**”
5. It is clear that the court may make such order as it thinks fit in relation to a certificate of costs. The words “**including**” does not in any way exclude entry of judgment on a Certificate of Costs that has not been altered or set aside. I would not therefore respectively take a different view from Nyamu J (as he then was) that judgment can also be entered even where there is no dispute of the retainer. I say this because it is not uncommon for a client to dispute a retainer. If the court were to take the view that judgment could only be entered where there was no dispute of a retainer, this would be a misapplication of the law. An advocate who would have successfully canvassed the issue of the retainer and a certificate of costs issued in that regard, the court having been satisfied that the retainer was as the advocate had charged or as had been found to have been due by a taxing master. There would therefore be no need to file a suit for recovery of costs.
6. I hold the view that once a taxing master has taxed the costs, issued a Certificate of costs and there was no reference against his ruling, no other action would be required save for entry of judgment. An applicant is not required to file suit for the recovery of costs. I would agree with the learned judge that the certificate of costs is final as to the amounts of the costs. This court would therefore be in order to enter judgment in favour of the Applicant against the Respondent for the sum of Kshs 577,460/= as the Certificate of Costs issued on 23rd January 2013 was final as to that amount.

24. This has been emphasised in Section 48 (3) of the Advocates Act which provides that:-

“Notwithstanding any other provision of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs had been filed.”

1. There does not appear to have been any dispute that the Respondent instructed the Applicant to act on its behalf. Accordingly, I hereby dismiss the Respondent’s Grounds of opposition No (1) and (4) as they more or else dealt with the same issue.
2. In prayer No (1) of the present application, the Applicant sought interest on the sum of the taxed costs of Kshs 577,460/=. It was the Respondent’s submissions that the Applicant could not claim for interest because it did not serve a thirty (30) days notice as required under Rule 7 of the Advocates Remuneration Order which provides as follows:-

“ An advocate may charge 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, providing such claim for interest is raised before the amount of the bill has been paid or tendered in

full.”

1. It is clear that the said Rule 7 deals with interest charged by an advocate of its claim for disbursements and costs which is chargeable from the expiration of one (1) month from the date of his delivery of its bill to its client. This interest is distinguishable from the interest that this court can award.
2. This court has jurisdiction under Section 51(2) of the Advocates Act to make any order that it deems fit. Entry of judgment and award of interest at court rates is within the ambit of what this court can do. I am therefore not persuaded by the Respondent’s submission that Section 51(2) of the Advocates Act excludes interest. I would, however, agree with its arguments that if an advocate files his Bill of Costs without raising the issue of interest, then an applicant forfeits interest as provided for under Rule 7 of the Advocates Remuneration Order. The Applicant herein can only be entitled to the interest on the amount in the Certificate of Costs which the Respondent argued could only be at 9%.
3. For the aforesaid reasons, I hereby dismiss the Respondent’s Grounds of Opposition Nos (2) and (3) which dealt with the issue of interest.
4. I am in total agreement with Havelock J holding in the **Njonjo, Okello & Associates case**. I find no good reason or justification why the Applicant should be denied fees after the Respondent utilised its legal services **in Milimani High Court Civil Case No 592 of 2000**. The Respondent did not provide the court with any proof that the Certificate of Costs issued on 23rd January 2013 was altered or that there were any proceedings pending before a court of competent jurisdiction barring the Applicant from enjoying the fruits of its hard work.
5. It is for the reasons stated hereinabove that I find no hesitation in dismissing the Respondent’s Grounds of Opposition dated 11th March 2013 and filed on 12th March 2013. The same are hereby dismissed.
6. Accordingly, I hereby enter judgment in favour of the Applicant against the Defendant for the sum of Kshs 577,460/= arising out of the Applicant acting for the Respondent in **Milimani High Court Civil Case No 592 of 2000** together with interest thereon at court rates with effect from 14th December 2012. The Respondent will bear the Applicant’s costs of this application.
7. It is so ordered.

DATED and DELIVERED at **NAIROBI** this 24th day of May 2013

J. KAMAU

JUDGE