



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 45 OF 2013 (OS)

IN THE MATTER OF: THE ADVOCATES REMUNERATION ACT CAP 16

LAWS OF KENYA

BETWEEN

INVESCO ASSURANCE COMPANY LTD PLAINTIFF

V E R S U S

J. G. KARIUKI

T/A GACHIRI KARIUKI & CO. ADVOCATES DEFENDANT

RULING

1. The Plaintiff has filed this case by way of Originating Summons. Plaintiff prays for a finding that-
 - a. *The Respondent and the Applicant had a global scheme on the modalities of payments of the matters being handled by the Respondent rather than deal with each matter singularly and then reconciliation to be done to establish how much had been paid on account.*
 - b. *The Applicant had paid to the Respondent monies on account as fees amounting to Kshs. 8,400,000/- which substantially if not cleared the Respondent's fees which the Respondent has not reflected in their bill of costs.*
 - c. *The Respondent do render account for the deposits paid on account of each matter.*
2. The Plaintiff and the Defendant had an Advocate and Client relationship. The Defendant represented the Plaintiff in several suits. The Plaintiff's business is one of insurance as deponed by the Plaintiff's Legal Manager. The bulk of the Plaintiff's business is in the insurance of public sector motor vehicles.
3. The Plaintiff set out its case by stating that on or about February 2008 it was placed under statutory management. The Statutory Manager who was appointed by the Commissioner of Insurance declared a moratorium for one year. That moratorium was confirmed by the Court. The moratorium stopped all prosecution of suits, taxation of bill of costs and execution against the Plaintiff.

4. The Company started to operate its business in the year 2010 when the moratorium was lifted. That it was then that the Plaintiff requested the Advocates that had represented it to present their bill of cost for settlement. This according to the Plaintiff was necessitated by the fact that the Plaintiff did not have adequate information of the outstanding fees owed to its panel of Advocates. On obtaining that information the Plaintiff realized that it would take many years to settle those fees.
5. It was as a consequence of that disclosure that the Plaintiff stated that it entered into agreements with the Advocate in this matter to settle the amount owed to it by payment of monthly instalments.
6. The Plaintiff pleaded that it entered into such an agreement with the Defendant whereby the Defendant was to be paid by those monthly instalments rather than payment of case by case. The Plaintiff further pleaded that its first agreement with the Defendant was in the year 2010. That it was then that it began to pay the Defendant Kshs. 200,000/- per month and that amount was enhanced to Kshs. 400,000/- per month. The payments were finally enhanced to Kshs. 700,000/- per month.
7. Plaintiff deponed that the scheme of payment was intended to afford it an opportunity to undertake reconciliation of its accounts. According to the Plaintiff that scheme of payment was frustrated by the Defendant filing Advocates/Client bill of cost for taxation. The Plaintiff is of the view that the Defendant's bill of costs failed to take into account the amounts paid to the Defendant on account. Although the Plaintiff deponed that the Defendant filed bills of costs during the period of moratorium which would have been contrary to the Court order the Plaintiff failed to annex any evidence of such contravention.
8. The Plaintiff deponed that many of the Defendant's bill of costs had proceeded to taxation exparte. After those taxation that the Defendant proceeded to execute for those taxed costs by filing garnishee proceedings. The Plaintiff deponed that this was done despite the Plaintiff having made payment to the Defendant. It is of that basis that the Plaintiff seeks by an interlocutory application dated 24th June 2013 for stay of execution. The Plaintiffs specific prayers in that Notice of Motion are as follows-
 2. ***That this Honourable Court be pleased to Stay Execution of Certificates of Costs obtained in taxation of bills of costs arising from the suits in the annexed schedule herein and all consequential orders pending inter partes hearing and determination of this application.***
 3. ***That this Honourable Court be pleased to stay execution in all other matters arising from taxations filed by the Respondent herein against the Applicant which matters have been erroneously and/or omitted for lack of records pending inter partes hearing and determination of this application.***
 4. ***That this Honourable Court be pleased to grant Orders 2 and 3 pending hearing and determination of the suit herein.***
 5. ***That this Honourable Court be pleased to order that the Respondent renders a statement of account tabulating the monies received in relation to the matters it is now taxing.***
9. The Plaintiff's learned counsel in his written submissions urged the Court to bear in mind the provisions of Section 1A and 1B of the Civil Procedure Act Cap 16. Those Sections set out the overriding objective of the Act. In this regard learned Counsel referred to the case **Caltex Oil Ltd -Vs- Evanson Wanjihia Civil Application No. Nai 190 of 2009** (unreported). The Court in that case had this to say-

“... the overriding objective provides that the purpose of the two Acts and the rules is to facilitate the just, expeditious, proportionate and affordable resolution of civil

disputes. Although the overriding objective has several aims, the principal aim is for Court to act justly in every situation either when interpreting the laws or overcoming its power. The Court has therefore been given greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective.”

10. The Respondent opposed the Notice of Motion by way of a replying

affidavit sworn by Duncan Chebukaka on 21st May 2013. He deponed in that replying affidavit that the Plaintiff's Notice of Motion was an abuse of the Court process. The reasons he gave are that: (a) that the application was *res judicata* because it was a duplication of the one filed by the Plaintiff before the High Court at Nyeri; (b) that the application was an afterthought after the Plaintiff was denied orders in Nyeri High Court; (c) that the application is frivolous, vexatious and an abuse of the Court process; (d) that the Plaintiff should have challenged the individual taxations through a reference in High Court and (e) that this Court lacks jurisdiction to entertain the application.

12. The deponent further stated that the Defendants firm of Advocates had

rendered legal services to the Plaintiff from the year 2001. That in that time the Plaintiff had been irregular in settling their fees. That the Plaintiffs liability towards the Defendants was in respect of fees that were owed in individual files and not a global amount.

13. In its written submissions the Defendant stated that the Plaintiff's suit

was in contravention of Section 6 of Cap 21. That Section forbids the Court from proceeding with an action which the matter in issue is also directly and substantially initial in previous instituted suit. The Defendant relied on the case of **Bundotich -Vs- Managing Director Kenya Airports Authority & Ano. [2007]2EA90** where the Court stated-

“The issue at the core of both this suit and the other suit was the ownership of Land Reference No. 209/1424. Obviously if the Plaintiff succeeded in the other suit the Plaintiff herein would have no leg to stand on. If that were to happen the Court would have not have been put to dispute. Meanwhile if the two [2] Cases were left to run side by side in two [2] different Court that would be a waste of precious judicial time. In order to ensure that judicial time is utilized in an optimum manner and also to safeguard the integrity of the judiciary by removing the possibility that the two [2] Courts of concurrent jurisdiction might arrive at inconsistent decisions on the same subject matter, this suit should be struck out.”

The Defendant also relied on the case **HCCC MBSA 241/2003 James Matheka & Others -Vs- Baobab Farm Ltd** where the Court had this to say-

“Parties come to Court when aggrieved or in pursuit of relief. It is not that to seek relief that a party shall file every kind of application the same Court hoping to fall by luck either here or there as if Courts play a game of chance. That clogs, confuses and even harass the opponent.”

14. The Defendant submitted further that the Plaintiff's only avenue was to challenge the taxed costs by way of a reference as provided under paragraph 11 of the Advocates (Remuneration) order. That having failed to do so the Defendant argued that by virtue of Section 51(2) of the Advocates Act this Court cannot stay the execution of taxed costs. That Section is in the following terms-

“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 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 a sum

certified to be with costs.”

15.As I consider the Notice of Motion before me I need to remind myself that it is an interlocutory application. The issues that I believe present themselves are two:- The first is whether the Plaintiff’s application is *res judicata* or whether it violates the provisions of Section 6 of Cap 21. The second is whether the Plaintiff is entitled to stay of execution of taxed costs.

16.Section 7 of Cap 21 is the one that sets out the doctrine of *res judicata*. That Section provides that no Court shall try a case which matter is directly or substantially in issue and has directly or substantially been in issue in the former suit between the parties which has been heard and finally decided by a Court. The Defendant in advancing its argument that the Plaintiffs suit is caught by that doctrine did not provide the final order of a Court where the issues raised by the Plaintiff have been litigated. This ought to have been done as was held in the case **Mbeu Kithakwa -Vs- Philip Muchiri Mugo Civil Case No. 87 of 2007**. In that case the Court held-

“However, much more than that, it should by now be clear that the Plaintiff in filing this case replicated the lower Courts case. Section 7 of the Civil Procedure Act forbids the Court from entertaining an action in which the matter directly or substantially had been directly and substantially in issue in a former action which has been heard and finally determined by a competent Court. The doctrine of res judicata related to matters adjudicated upon or a matter upon which judgement has been pronounced.”

It is clear that this matter does not satisfy the requirements of Section 7 of the Cap 21. The Defendants submissions therefore in this regard are rejected on that ground.

17.The argument that the Plaintiffs action offends Section 6 of Cap 21 may have a basis particularly because the Plaintiff seeks to stay “all other matters arising from taxation filed by Respondent”. Such prayer may cover matters before other Courts such as those that are alluded to by the Defendant said to be at the High Court at Nyeri. The determination of whether Section 6 is indeed offended may have to wait for evidence to be produced to this Court.

18.On the second issue the Plaintiff rely on Section 45 of the Advocates Act Cap 16. That Section validates any agreement between the Advocate and the Client relating to the Advocates remuneration where an Advocate and Client enter into an agreement fixing the Advocates fees. That Section provides as follows-

“... and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.”
(emphasis mine)

19.The Plaintiff submitted that there was a meeting between it and the Defendant and that an agreement was reached whereby the Plaintiff would pay the Defendant a fixed amount on a monthly basis. The only document relating to such an understanding if any was the Defendants letter dated 19th March 2013. In that letter the Defendant in part stated-

“RE: OUTSTANDING LEGAL FEES

Reference is made to the above matter. Our numerous correspondences on the same, the M.O.U reached on settlement of the finalized fee notes prior to our subsequent protests on your failure to honour and persistent defaults We did agree with your goodselves that we would commence with Mombasa Branch finalized fee note and we did supply you severally with such fee notes sufficient to last three or four instalments and are unable to understand why we cannot get it right.”

20.Other than that letter there is no other document to evidence an agreement between the parties. As it will be noted Section 45 quoted above specifically requires an agreement to be in writing and to

be signed by the client for it to be a valid agreement under that Section. Since no such agreement was produced on a prima facie basis I find that there was no agreement on the Defendants fees. Had there been such an agreement Section 45(6) forbids an Advocate from proceeding with taxation on such a matter. That Section provides-

“Subject to this Section, the costs of an Advocate in any case where an agreement has been made by virtue of this Section shall not be subject to taxation”

21.It follows that the Plaintiff is not entitled to stay by virtue of an agreement on the Defendants fees. The Plaintiff is also not entitled to a stay on the basis that reconciliation has not yet been done. Such a ground does not justify the stay of execution of taxed costs. The only avenue that was open to the Plaintiff was to file for reference as provided under paragraph 11 of the Advocates (Remuneration) Order. That paragraph provides-

“Should any party object to the decision of the Taxing Officer, he may within fourteen (14) days after the decision give notice in writing to the Taxing Officer of the items of taxation to which he objects.”

22.Once such a notice is given the Taxing Officer is required to give reasons for his decision and it is after those reasons are given and within fourteen (14) days thereafter that the party in dispute files a reference before a Judge as provided under paragraph 11(2). As stated before, the Plaintiff did not invoke that paragraph and additionally therefore the stay that the Plaintiff seeks cannot be issued.

23.In the end, I find that there is no merit in the Plaintiff’s Notice of Motion dated 24th June 2013. It is therefore dismissed with costs to the Defendant. Previous stay of execution granted in this matter is hereby vacated.

Dated and delivered at Mombasa this 10th day of September, 2013.

MARY KASANGO

JUDGE