



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
MISCELLANEOUS APPLICATION NO. 659 OF 2011

DALY & FIGGIS ADVOCATES ADVOCATE/APPLICANT

VERSUS

HOMELEX LIMITED CLIENT/RESPONDENT

RULING

1. The Applicants/Advocates have brought a Notice of Motion before this Court dated 26th March 2013 in which they asked this Court to confirm the costs due to them as taxed and certified as per a Certificate of Taxation dated 26th September 2012. As a result, the Applicant/Advocates seek that judgement be entered in their favour in the amount of Shs. 120,045.88. The Application is brought under the provisions of **section 51 (2)** of the *Advocates Act* as well as **section 3A** of the *Civil Procedure Act*. The Grounds of the Application detailed that the particulars of the Certificate of Taxation as above, as well as confirming that the Respondent had not challenged the Taxing Officer's Ruling on costs herein. The Certificate of Taxation had not been set aside or altered by Court. The Supporting Affidavit of **Desmond Odhiambo**, an advocate practising with the said advocates' firm, confirmed that position and noted that the firm had represented the Respondent from 3rd February 2006 until it received a Notice of Change of Advocates dated 23rd June 2011. The deponent stated that the Respondent had failed to settle the costs as demanded and it was in the interests of justice that Judgement should be entered against it in this respect.
2. One **Gulhamid Jivanji** a director of the Respondent company swore a Replying Affidavit on 8th May 2013. He maintained that he had been informed by the advocates on record for the Respondent that it had fully paid the Advocates' costs as per the Certificate of Taxation in the amount of Shs. 120,045.88. He gave details of 2 cheques drawn on 5th April 2006 and 14th June 2007 in which the Respondent had paid a total of Shs. 120,735/-to the said advocates' firm amounting to an overpayment of Shs. 689.12. He attached copies of the receipts for the cheques paid. The deponent confirmed that that the Respondent had not disputed or challenged the costs.
3. The said **Desmond Odhiambo** swore a Further Affidavit dated 19th June 2013. He maintained that the said 2 cheques tendered by the Respondent in payment of the advocates' fees were in respect of legal services tendered for the period commencing on or about 3rd February 2006 and ending on or about 18th May 2007. He attached to his said Affidavit a revised Fee Note to this end. The deponent stressed that the costs sought as per the taxed Bill of Costs and the Certificate of Taxation dated 26th September 2012 were in respect of legal services for the period commencing on or about 1st April 2007 to 29th June 2011. This had been borne out by the details of the Bill of Costs dated 5th August 2011 which had been filed for taxation purposes. He noted that during the taxation proceedings, the Respondent had contended that the two aforementioned cheques had been issued in full settlement of the costs due to the Applicant/ Advocates. The Applicant had opposed that contention and such was borne out by the submissions filed with the

- Taxing Officer. The deponent maintained that while taxing the Applicant's Bill of Costs, the Taxing Officer took the aforementioned payments into account in arriving at the final figure owing to the Applicant/ Advocates.
4. The Applicant/Advocates' filed their submissions herein on 22nd July 2013. After setting out the background in relation to the Application, the Applicant/Advocates related the history in terms of the taxation proceedings of its Bill of Costs filed on 5th August 2011. It was originally drawn in the sum of Shs. 199,534.50. They noted that the contention by the Respondent in the Replying Affidavit that it had settled the Applicant/Advocates' legal fees in full and that it was entitled to a refund, had been well canvassed at the taxation stage. The question of the Applicant/Advocates' instruction fees was also so canvassed. The Taxing Officer had taken into account the Respondent's contentions and had taxed the Applicant/Advocates' Bill of Costs in the amount of Shs. 120,045.88. She had thereafter signed a copy of the Certificate of Taxation. As regards the legal position on the confirmation of costs as taxed and the entry of Judgement, the Applicant/Advocates referred this Court firstly to **section 51 (2)** of the *Advocates Act* but also the cases of **Ahmednassir Abdikadir & Co Advocates v National Bank of Kenya Ltd (2006) eKLR** as well as **A.M. Kimani & Co Advocates v Kenindia Assurance Company Ltd (2006) eKLR**. They maintained that both these cases show would that where a Certificate of Taxation had neither been set aside nor altered by the Court and where there was no order for stay, the Certificate was final as to the amount of costs covered thereby. **Section 5 (2)** of the *Advocates Act* provided that where a Certificate of Taxation had been issued and the same had not been set aside or altered and where the retainer had not been disputed, an applicant would be entitled to Judgement in the amount of the sum certified by the Certificate of Taxation. Similarly, on the question of interest on the Judgement sum, the Applicant/Advocates pointed to **Rule 7** of the *Advocates (Remuneration) Order* which allowed for an advocate to charge interest at 14% per annum on his disbursements and costs. They referred to the cases of **Mutunga Muindi Advocates v Busscar Ltd (2006) eKLR** as well as the **A. M. Kimani** case (supra). As regards the costs of the Application the Applicant/Advocates submitted that **section 27** of the *Civil Procedure Act* applied in this matter.
 5. The Respondent filed its submissions herein on 28th July 2013. It maintained that the law was quite clear that instruction fees in a matter were only chargeable once and could not be charged piecemeal. In this regard, it referred the Court to the case of **D. Njogu & Co Advocates v Panafcon Engineering Ltd HC Misc. No. 942 of 2005** in which the learned Judge had referred to the decision in **Joreth Ltd. v Kigano & Anor. (2002) 1 EA 92**. It maintained that as the allegations by the Applicant/Advocates that the amounts they had received were for the periods prior to 2007, could it be that the same included instruction fees? The Respondent maintained that the Applicant/Advocates had intentionally not put before Court any Bill of costs or fee note which had led to the payment of Shs. 70,000/- made on 5th April 2006. There was also some doubt, as a result of the fee note dated 18th May 2007, as to the period to which it related. The Bill of Costs that had been taxed had indicated that it arose for the period from 1st April 2007 through to August 2011. Thereafter, the Respondent referred the Court to **section 51 (2)** of the *Advocates Act* as well as quoting extensively from the cases of **Njogu Co Advocates v Savings & Loan Kenya Ltd HC Misc Case No. 356 of 2006**, **Khan & Katiku Advocates v Central Electrical International Ltd HCCC No. 559 of 2004**, **Meenye & Kirima Advocates v Kenya Commercial Bank HC Misc Case No. 511 of 2004**, **Mgugua & Mbugua Advocates v Kenindia Assurance Co. Ltd HC Misc Case No. 945 of 2005** and **Joshua Odanga v Ezekiel Oduk HC Misc Case No. 771 of 2004 (all unreported)**.
 6. I have perused the Affidavits of the Applicant/Advocates in support of their Application as well as the Replying Affidavit of the Respondent dated 8th May 2013. The Revised Fee Note exhibited to the Replying Affidavit although dated 18th May 2007 refers to professional services rendered in relation to filing a Winding-up cause as against a company known as Jaribu Credit Traders Ltd which was said to owe the Respondent a sum of Shs. 1,191,504/-. The body of the said Fee Note contains references to appearances in Court on 8th March 2006 as well as 4th October 2006. The total amount of that Fee Note including VAT came to Shs. 118,320/-and the same acknowledged receipt of a payment on deposit of Shs. 67,585/-. Unfortunately there is no reference on the Fee Note of when that deposit amount was paid. Indeed, there would seem to be no reference to the sum of Shs. 70,000/-paid by the Respondent on 5th April 2006. However, the amount of Shs.

50,735/-paid by the Respondent on 14th June 2007 would appear, to my way of thinking, to be the balance due under that said Fee Note. Again annexed to the Replying Affidavit of the Respondent is its letter dated 5th April 2006 which notes that Cheque No. 766117 in the amount of Shs. 70,000/-was paid by way of deposit on legal fees.

7. Turning now to the Advocate/Client Bill of Costs which was taxed by the Taxing Officer, Mrs. L. M.Njora, in the amount of Shs. 120,045.88, the Court notes that it was raised in connection with the instructions received from the Respondent to prosecute the suit being HCCC No. 63 of 2006 for the recovery of a liquidated claim of Shs. 1,034,818/-as against Jaribu Credit Traders Ltd. Such is a totally different suit to that referred to in the said Revised Fee Note of 18th May 2007. Although the company being sued in both cases was Jaribu Credit Traders Ltd, the first suit involved a Winding-up Cause in 2006 while the second covered a straightforward debt claim which turned out to be not so. In the submissions of the Applicant/Advocates made before the Taxing Officer dated 29th November 2011 it detailed in the third paragraph thereof that:

“The winding up proceedings were however halted by the Plaintiff’s Application for injunction.”

From this, it would appear that the Applicant/Advocates were entitled to 2 sets of Instruction Fees in respect of each of the 2 Applications before Court.

8. Although I have taken cognizance of the various cases cited by the Respondent before this Court, I do not consider that any of them are particularly relevant to what is before me. Such involve decisions by individual Judges in relation to individual references. Each suit has a different set of facts upon which the Judges concerned made individual determinations. In this case, I must necessarily take cognizance of **section 51 (2)** of the Advocates Act which 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 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 judgement be entered for the sum certified to be due with costs.”

Such was the finding by the my learned brother **Azangalala J.** in the **Ahmednassir** case as aforesaid when he detailed:

“I... agree with Hon. Njagi J’s interpretation of Section 51 (2) of the Advocates Act in *Macharia Njeru Advocates –vs-Communication Commission of Kenya HCCC No. 1029 of 2002* and *Nyakundi & Company Advocates –vs-Kenyatta National Hospital HCCC No. 416 of 2004*. The Learned Judge held that the words of the said section were very clear that where a Certificate of Taxation had neither been set aside nor altered by the Court, and where there was no order of stay, the Certificate was final as to the amount of costs covered thereby and to allege a dispute at summary Judgement stage would amount to a contradiction of express and mandatory statutory provisions.”

I believe that the same situation as in the **Ahmednassir** case applies here. As I have indicated above, I do not find that the instruction fees were charged twice. There were definitely two separate instructions given by the Respondent to the Applicant/Advocates.

9. As a result, I find that the Applicant/Advocates’ Notice of Motion dated 27th March 2013 has merit. I enter Judgement for the Applicant/Advocates in the amount of Shs.120,045.88 being the Certified costs as per the Certificate of Taxation dated 16th October 2012. I allow the Applicant/Advocates the costs of their Application.

DATED and delivered at Nairobi this 11th day of December, 2013.

J. B. HAVELOCK

JUDGE