



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Miscellaneous Application 624 of 2009

GICHUKI KING'ARA & CO. APPLICANT

VERSUS

MUGOYA CONSTRUCTION & ENGINEERING LIMITED RESPONDENT

RULING

The applicant's application dated 23rd February, 2012 seeks the following orders:

“1. THAT judgment be entered for the sums of Kshs.29,497,765.55 taxed and certified by the Deputy Registrar as due to the applicant/advocate with the interest thereon at 25% p.a. from 30th April 2009 till payment in full.

2. THAT the taxed cost be forthwith secured by the attachment of the Consent Decree issued in HCCC No., 671 of 2005 Mugoya Construction & Engineering Ltd –vs- N.S.S.F. Board of Trustee and a Garnishee Order nisi do issue restraining the N.S.S.F. from releasing any funds to the decree holder until this suit is finalized and/or due security is given by the decree holder in HCCC No. 671 of 2005 Mugoya Construction & Engineering Ltd –vs- N.S.S.F. Board of Trustee.

3. THAT the cost of this application be borne by the Respondent.”

2. In an affidavit sworn by **Peter Gichuki King'ara**, a senior partner in the applicant's firm, he deposed that on 29th September, 2005 the respondent instructed his firm to institute proceedings against National Social Security Fund and Symbion International, seeking various reliefs and orders and the applicant proceeded to do so by filing **HCCC No. 59 of 2005**.

3. On or about 30th April, 2009 the applicant prepared and filed an advocate/client bill of costs in respect of its fees.

4. The bill was taxed at **Kshs.29,497,765.55** and a certificate of taxation was subsequently issued.

5. There is no dispute as to retainer but the respondent failed and/or neglected to settle the taxed costs,

Mr. King'ara stated.

6. Subsequent to the filing of HCCC No. 59 of 2005 the respondent negotiated directly with National Social Security Fund and was paid an undisclosed sum of money in an out of court settlement, Mr. King'ara added.

7. The applicant further stated that the respondent ceased trading eight years ago and does not have any known assets in the country. It is for that reason that the applicant urged the court to order that the sums taxed herein be secured by an attachment of the decree issued in HCCC No. 671 of 2005.

8. Mr. King'ara further stated that the respondent has relocated almost all its assets to Uganda where its Managing Director and principal shareholder, **Mr. James Abiam Mugoya Isabirye** hailed from.

9. The respondent through Mr. Isabirye, filed a replying affidavit. He denied that he has any intention of leaving the country, saying that Mr. King'ara is well aware that he has lived in Kenya since early 1970 and had his university education at the University of Nairobi. Mr. Isabirye further denied that the respondent has relocated all its assets and added that all his business interests are in Kenya.

10. Regarding High Court Civil Case No. 59 of 2005, Mr. Isabirye stated that the applicant lost interest in representing the respondent several years ago and he even notified the respondent that he was no longer interested in representing him and demanded settlement of all his legal fees.

11. Since the respondent had not realized any benefit from the litigation there was reluctance to pay the exorbitant fees that was being demanded by the applicant.

12. Sometimes in April 2009 the applicant filed advocate/client bill of costs in **High Court Miscellaneous Application No. 298 of 2009** seeking recovery of costs in the sum of **Kshs,465,674,197/=** on account of work done in HCCC No. 59 of 2005. The respondent was surprised by that move because it was aware that the applicant had previously filed an advocate/client bill of costs in **High Court Miscellaneous Application No. 1108 of 2005** arising from the conduct of the same suit. The bill was compromised following a meeting Mr. Isabirye had with Mr. King'ara on the night of 27th February, 2006. Mr. Isabirye annexed to his affidavit a copy of a letter dated 28th April, 2006 which the respondent addressed to Mr. King'ara vide which Mr. King'ara acknowledged receipt of Cheque No. 0001998 for Kshs.5 Million in part payment. The letter sets out the amounts that were agreed to be paid and the same was alleged to have been initialed by Mr. King'ara. The respondent expected that the contents of the said letter and in particular the deposit of Kshs.5 Million would be taken into consideration in the taxation of the applicant's bill of costs.

13. The respondent further stated that the court file in respect of High Court **Miscellaneous Application No. 1108 of 2005** has been missing and all attempts to trace the same have been futile.

14. On 18th January, 2010 the Taxing Officer taxed the applicant's bill in the sum of Kshs.29,497,675.55 and the respondent, being aggrieved by the ruling, filed a notice of objection dated 29th January, 2010 and sought reasons for the decision. Subsequently, the respondent filed an application dated 30th April, 2010 challenging the taxation. The application was partially heard before Apondi, J.

15. In addition, Mr. Isabirye deposed that the dispute in HCCC No. 59 of 2005 was governed by an arbitration clause and was indeed referred to arbitration but before the arbitral proceedings could be concluded the applicant applied for leave to cease acting for the respondent. Mr. Isabirye alleged that the arbitral proceedings were frustrated by the applicant's conduct.

16. In supplementary affidavits filed by Mr. King'ara, he denied any knowledge of the respondent's letter dated 28th February, 2006. He also denied that there is any valid reference filed against the taxation.

17. **Mr. King'ara** for the applicant and **Mr. Ohaga** for the respondent filed their respective submissions

and highlighted the same.

18. It is not in dispute that the applicant's bill of costs was taxed at Kshs.29,497,765.55 and a certificate of taxation issued thereafter. It is also undisputed that there was a retainer between the applicant and the respondent.

19. **Section 51 (2)** of the **Advocates Act** states that:

“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.”

That position in law has been affirmed in several decisions for example, **AHMEDNASIR ABDIKADIR & CO. ADVOCATES vs NATIONAL BANK OF KENYA [2006] eKLR, OWINO OKEYO & CO. ADVOCATES vs MIKE MAINA & ANOTHER, Miscellaneous Application No. 651 of 2004 and WAMAHIU KIMERIA t/a WAMAHIU & CO. ADVOCATES vs NORDICK DEVELOPMENT LIMITED [2008] eKLR.**

20. Following the ruling by the Taxing Officer delivered on 18th January, 2010 the respondent filed a notice of objection on 29th January, 2010 and a chamber summons under **Rule 11** of the **Advocates (Remuneration) Order** on 30th April, 2010.

21. Counsel for the parties appeared before Apondi, J. on several occasions between 8th June, 2010 and 3rd March, 2011 when the respondent's advocate made his final submissions in respect of the application dated 30th April, 2010.

22. The record shows that Mr. King'ara was to reply on 4th April, 2011 but on that day the trial judge was indisposed and counsel were directed to take another date at the registry.

23. Nothing transpired between 4th April, 2011 and 23rd February, 2012 when the applicant filed its application.

24. According to Mr. Isabirye the file that went missing is HCCC Miscellaneous Application No. 1108 of 2005. I believe that the file in respect of the current application has all along been available at the registry and if the respondent was keen on finalizing its application dated 30th April, 2010 it ought to have fixed a date at the registry

25. I am aware that the Hon. Mr. Justice Muga Apondi was transferred to another station but that was not a bar to finalization of the pending application. There was no application made by the respondent to put on hold the hearing of the applicant's application dated 23rd February, 2012 pending finalization and determination of its application dated 30th April, 2010. The applicant was not under any obligation to push for the finalization of the respondent's application.

26. In the circumstances, pendency of the respondent's application seeking to challenge the decision of the Taxing Officer cannot be a bar to the determination of the applicant's application. The court cannot speculate on the outcome of the respondent's application and must therefore determine the applicant's application on its merits.

27. In view of the fact that the applicant's bill of costs has been taxed and a certificate of taxation issued and the same has not been set aside and there is no dispute as to retainer, I enter judgment in favour of the applicant in the sum of **Kshs.29,497,765.55** together with interest thereon at 14% per annum.

28. With regard to prayer 2 of the applicant's application, Mr. King'ara conceded that the amount due to

the respondent in respect of HCCC No. 671 of 2005 has already been paid and consequently the order sought has been overtaken by events.

29. The respondent shall bear the applicant's costs herein.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE, 2012.

D. MUSINGA

JUDGE

In the presence of:

Muriithi – Court Clerk

Mr. King'ara for the Applicant

Mr. Muindi for Mr. Ohaga for the Respondent