



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

MISC. CASE NO. 1047 OF 2007

**MURI MWANIKI KIRUTI & WAMITI ADVOCATESPLAINTIFF
VERSUS**

WILSON KINYANJUI KURIA..... DEFENDANT

RULING

The applicant in the Notice of Motion dated 17th August 2010 is a firm of Advocates in whose favour a Bill of Costs was taxed at Kshs. 51,288.90/= on 22nd October, 2007 and a certificate thereof duly issued on 28th July, 2010. Despite demands by the Applicants that the Respondent/Client settles the said costs, the Respondent had refused to do so, hence the present application.

The application is brought under **Section 51 (2)** of the **Advocates Act** and prays that judgment be entered in the taxed sum with interest at the rate of 14% p.a. from 26th June, 2006 (the date of filing the Bill of Costs) until payment in full, pursuant to **Rule 3** of the **Advocates Remuneration Order**. Costs of the application are also sought.

Nothing was filed in opposition to the application but oral submissions on points of law were made on behalf of the Respondents at the hearing of the same. Before making his representations, learned counsel, Mr. Kariuki, holding brief for Mr. Wambugu, for the Respondents intimated to the court that the Respondent had been notified of the application and the hearing date but had not instructed his advocate on how to proceed.

To support the application the applicants filed an affidavit sworn by Mr. Njuguna Muri on 17th August 2010, in which he has deponed, *inter alia*, that, despite being made aware of the taxation of costs, the Respondent had not filed any reference objecting to the same and therefore, the applicant is entitled to a judgment, in order that a decree can issue for execution. He argues that the retainer not being disputed and the certificate of costs having not been set aside or altered, the court ought to exercise its discretion and enter judgment under **Section 51(2)** of the **Advocates Act**.

Submitting on behalf of the applicant, learned counsel, Miss Odongo, cited the judgment of the Honourable Sitati J. in **J. B. KIBICHO & CO. ADVOCATES –VS- INOI FARMERS CO-OPERATIVE SOCIETY LTD NRB MISCELLANEOUS APPLICATION No. 278 OF 2007**, wherein a similar application was allowed.

Counsel appearing for the Respondents submitted that the orders sought herein cannot issue in an

application filed under **Section 51 (2)** and that the applicant ought to have moved the court by way of a suit, commenced by the filing of a **Plaint**. In his view, the certificate of taxation serves only as a demand note and no more. He cited two decisions of the Honourable Kimaru J. namely;

1. **HAVELOCK MURIUKI & RAVAL ADVOCATES –VS- JAYANTILAL DHRRAMSHI GOSRANI (Milimani) Misc Civil Application No. 60 of 2007.**

2. **JAMES GITAU SINGH –VS- NATIONAL BANK OF KENYA LTD (Milimani) Misc. Application No. 179 of 2008**

Counsel for the applicant submitted that **Section 51 (2)** applies only to applications where orders sought are for the taxation of an Advocates –Clients Bill and not more. Responding to this argument, counsel for the Respondent submitted that the position taken in the **KIBICHO** case supra is the correct one and that the case of **JAMES GITAU SINGH** (supra) was distinguishable.

Section 51(2) of the **Advocates Remuneration 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 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 the sum certified to be due with costs”.

I have carefully considered the authorities submitted herein to support the rival positions taken by the parties hereto. The decisions therein are only persuasive upon me. I hold the view that the **Havelock** decision does not apply to this case since the application therein sought to have an order dismissing an application to stay taxation stayed pending appeal. The second decision was based on the interpretation of **Sections 48** and **49** of the **Advocates Act** as discussed in the Court of Appeal decision (Akiwumi J A) in **SHARMA –VS- UHURU HIGHWAY DEVELOPMENT LTD [2001] 2 E. A. 530.**

Section 48 reads as follows;

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

(2)Subject to subsection (1), a suit may be brought for the recovery of costs due to an advocate in any court of competent Jurisdiction.

(3) Notwithstanding any other provisions of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed”.

Section 49, on the other hand provides as regards judgments on costs, *inter alia*, as follows;

“49 Where, in the absence of an agreement for remuneration made by virtue of 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-

(a) no judgment shall be entered for the plaintiff, except by consent, until the costs have been taxed and certified by the taxing officer.

(b)-----

(c)-----

(d)-----”.

In my opinion **Section 51(2)** of the **Advocates Act** bestows upon the court a discretionary power to enter judgment on the taxation where there is no dispute as to the retainer, notwithstanding the provisions of **Section 48** and **49** of the **Act**, in all cases where the certificate of taxation has not been set aside or altered. I hold the considered view that **Sections 48** and **49** operate in situations where either the liability to pay costs and the quantum thereof are either uncertain or disputed and also where the retainer is disputed. Were they intended to operate in all situations then, in my view, the **Advocates Act** would not have gone further to provide a procedure for challenging a decision by a Taxing Officer, on taxation, as is the case under **Rule 11** of the **Advocates (Remuneration) Order**.

In view of the above I find that the applicant is entitled to judgment on costs pursuant to **Section 51 (2)** of the **Act** which stipulates quite clearly 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”.

The certificate of costs issued on 28th July 2010, specified that the applicant’s bill of costs was taxed as between the applicant and the Respondent on 22nd October, 2007, and allowed **“as against the Respondent in the sum of Kenya Shillings Fifty One Thousand Two Hundred and Twenty Eight and Ninety Cents (51,228.90/=) only”**. Moreover, I find that the applicant is entitled to interest on the said sum at the rate of 14% in accordance with **Rule 7** of the **Advocates Remuneration Order**.

Accordingly judgment is hereby entered for the applicant in the said sum plus interest as aforesaid together with the costs of the application.

Orders accordingly.

DATED SIGNED and DELIVERED at NAIROBI this 9TH day of FEBRUARY, 2011

M. G. MUGO

JUDGE

In the presence of:

Ms Ongeti

For the Applicant

Mr. Amadi holding brief for Mr. Kariuki

For the Respondent