



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC CASE NO. 151 OF 2011

MUEMA KITULU & CO. ADVOCATES.....PLAINTIFF

VERSUS

OBADIAH KUVIVYA.....DEFENDANT

JUDGMENT

On 13th April, 2011, the Applicant had his Advocate/client Bill of costs dated 8/3/2011 taxed by the Taxing Master at Kshs.34, 057/88. In pursuance thereof, the court issued a Certificate of Costs on 10th June, 2011.

Pursuant thereto, the Applicant filed in court a Notice of Motion on 9th August, 2011 seeking judgment in terms of the said certificate of costs. The Motion is expressed to be brought under Section 51 (2) of the Advocates Act and Sections 3 and 3A of the Civil Procedure Act. The Motion is supported by the Affidavit of Mr. Muema Kitulu Advocate sworn on 28th July, 2011. At the hearing of the application it was submitted for the Applicant that in August 2009, the Respondent instructed the Applicant to carry out certain legal work which was done, that upon completion the Respondent refused to respond to correspondence and telephone calls and also failed to pay the Applicant his fees, that the Advocates/client bill of costs was taxed on 13/4/2011 and costs assessed at Kshs.34,057/88 in favour of the Applicant, that a certificate of costs issued in respect thereof on 10/6/2011 had not been challenged there being no proper challenge thereto judgment should be entered as prayed.

Mr. Onjoro learned counsel for the respondent referring to the Replying Affidavit of Obadiah Kavivya sworn on 17th October, 2011 submitted that, the Respondent had never instructed the Applicant to carry out a search or transfer on Kapital Investments Ltd and Kilovoo Links Ltd, that she was unaware of the Bill of costs lodged in court on 9/3/2011 and taxed on 13/4/2011, that she has never refused to respond calls of Ms. Muema Kitulu & Co., that she does not owe any fees to the Applicant, that she had not been heard on the bill of costs, that the certificate of costs had been issued erroneously, that she needs to be heard on the said bill of costs and that the application should therefore be dismissed.

Section 51 (2) of the Advocates Act provides:-

“ (2) 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 dated 10th June, 2011 has not been set aside or altered. Can it be altered or set

aside on the strength of the Replying Affidavit and submissions made in opposition to the motion? I think not. In my view, once costs have been assessed and/or taxed under the Advocates Remuneration Order the proper procedure to follow in disputing the same is as provided by the Advocates (remuneration) Order.

Rule 11 of the Advocates (Remunerations) order provides:-

“ (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber commons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such Judge under subparagraph (2) may, with the leave of the Judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days’ notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

It is by filing a reference by Summons to a Judge that an aggrieved party can challenge a taxation and therefore a certificate of costs.

Before me there is no reference under Rule 11 of the Advocates Remuneration Order and to start re-opening the certificate of costs dated 10/6/2011 through a Replying Affidavit will be a blatant breach of the Law. This court cannot countenance such an eventuality. If the Respondent was minded to challenge the certificate of costs, she should have filed an application for enlargement of time under Rule 11(4) to file the reference out of time. Her Advocates came on record in July 2011, three (3) months ago. Having failed to make an application for extension of time as aforesaid, she cannot be heard to challenge the certificate of costs dated 10/6/2011 by way of a Replying Affidavit. She has not even given an explanation why she could not seek to challenge the said certificate between July, 2011 and the day the application came up for hearing.

Being of the foregoing view, I allow the Applicants Notice of Motion dated 28/7/2011 and enter judgment for the Applicant against the Respondent for Kshs.34,057/88 together with interest at court rate from 13th April 2011 until payment in full. The Applicant will also have the costs of the Application.

Dated and delivered at Nairobi this 28th Day of October, 2011

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JUSTICE A. MABEYA