



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MISC APPLICATION NO. 485 OF 2011

**ROCHAM ENTERPRISES LIMITED
T/A RICATTI BUSINESS COLLEGE OF EAST AFRICA.....APPLICANT**

VERSUS

EVANSON KAMAU WAITIKIRESPONDENT

JUDGMENT

Before me is a Notice of motion dated 20th May 2011, brought under Order 51 of the Civil Procedure Rules and seeks judgment against the respondent for Kshs . 147,536.20 being the taxed cost. It is supported by the Affidavit of Oyugi Stephen Okero who deponed that he is an Advocate of the High Court of Kenya who has the conduct of the proceedings on behalf of the Applicant. He swore that pursuant to a court order made in HCCC No. 220 of 2011, the applicants bill of costs was taxed at Kshs.147,536/20, that a certificate of costs had been issued and that it was therefore imperative that judgment be entered for execution to take place. Mr. Mogere who argued the application argued that whilst the respondent was represented in the said taxation and certificate of costs issued on 13th April 2011 no reference had been filed against the said certificate. He therefore prayed for judgment in terms of the application.

Mr. Oguwe counsel for the Respondent opposed the application relying on the Replying Affidavit of Evanson Kamau Waitiki sworn on 27th October, 2011. He submitted that the affidavit in support of the application was defective, that it was sworn by an Advocate and not the applicant, that this court's jurisdiction had not been properly invoked since Section 51 of the Advocates Act had not been cited, that the Respondent intended to make an application to review the Certificate of Costs.

Mr. Mogere in reply urged the court to hold that it was not fatal not to have cited the correct provisions of the law, on the face of the application that the overriding objective of the Act was to have expeditious disposal of Civil disputes and that failure to cite the correct provisions of law was only a technical mistake which is excusable. On the affidavit of Mr. Okero, Mr. Mogere was of the view that it was sufficient since that Advocate had sworn that he had the personal conduct of the matter on behalf of the applicant and that it had not prejudiced the Respondent.

I have read the Affidavits on record and considered the rival submissions of counsel. I note that the bill of costs was taxed on 13th of April 2011 consequent whereof a certificate of costs was issued by the court. That certificate can only be challenged or set aside or disturbed by the filing of a reference under

Rule 11 of the Advocates (Remuneration) Order. No such reference has been preferred by the Respondent and in my view the same cannot be challenged by way of a Replying Affidavit. Although this application was filed in May 2011, the Respondent did not find it proper to file the appropriate proceedings to challenge the certificate. The Respondent took no action against that certificate although it has been in existence for six (6) months as at the time the application came up for hearing. No good reason has been advanced for that failure.

On the failure by the applicant to cite the correct provision under which it is seeking the Orders. I believe such failure is not fatal. It is curable under Order 50 Rule 10 which provides

“1) every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated but no objection shall be made and no application shall be refused merely by reason of a failure to comply by this rule.”

As regards the Respondent's challenge to the Affidavit in Support for having sworn by an Advocate, I do not see anything fatal since the matters deposed to therein are matters that can be in the knowledge of the Advocate. The Advocate has sworn to be the one having the conduct of the case from which the current proceedings emanated. I have read that Affidavit and I find that the matters sworn to are not contentious as to make the Affidavit incurably defective. That being the case, I allow the application and enter judgment for the Applicant against the Respondent for Kshs.147,536/20 together with costs as prayed for in the application.

Dated and delivered at Nairobi this 4th day of November 2011.

JUSTICE A. MABEYA