



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 654 of 2006

**IN THE MATTER OF THE ADVOCATES ACT, CHAPTER 16 OF THE LAWS OF KENYA
AND**

IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATE AND CLIENT

OCHIENG' ONYANGO KIBET & OHAGA ADVOCATES APPLICANTS

VERSUS

ADOPT A LIGHT LIMITED RESPONDENT

RULING

1. The law firm of; **Ochieng, Onyango, Kibet and Ohaga Advocates** (hereinafter referred to as the applicants) were issued with a certificate of taxation dated 8th September 2008. The certificate shows that a bill of costs lodged by the applicants against the **Adopt Light Limited** (herein after referred to as the respondent) was taxed on 13th August 2008, as between advocate and client and costs of Ksh.7.815,050/-, was allowed against the respondent. By a notice of motion dated 9th September 2008 the applicants are seeking for judgment against the respondent in the sum of Ksh.7.815.050/- together with interest thereon at 14% per annum from 13th August 2008 until payment in full.
2. This application is premised on the grounds that advocates bill of costs was taxed and a certificate of taxation was issued. That order has not been set aside or altered thus the respondent is liable to pay the sum of Ksh.7.815.050/- being the amount awarded pursuant to taxation of the Advocates/Clients Bill of Costs. There is no dispute regarding the retainer of the advocate and the applicants duly acted for the respondent and it is met and just that

judgment be entered with interest.

3. This application is further supported by the affidavit by Mr. **John Morris Ohaga** sworn on 9th September 2008. He has given the detailed account of the instructions from the respondent to represent them in **HCCC MILIMANI NO.131 OF 2003**. In that case the applicants claim that they successfully defended the respondent and even filed a party and party bill of costs on behalf of the respondent which was taxed on 7th July 2006 in favor of the respondent in the sum of Ksh.4.924,250/-. The applicants then lodged their own bill of costs which was taxed on 13th August 2008. The bill has not been paid thus the applicants have applied under the provisions of section 51(2) of the Advocates Act, for that sum to be made a judgment of the court.

4. Counsel for the applicants submitted that there is no dispute over the retainer which is clearly discernable by the averments contained in the replying affidavit sworn by **Esther Muthoni Passalis** on 14th November 2008. Counsel further argued that it was not necessary to file a suit in view of the provisions of section 48(3) of the Advocates Act. Counsel also cited the case of **Gathenji and Company Advocates vs. Chomba and Others 2000 LLR 1674 (CCK)** where a similar objection was raised that an applicant required to file a substantive suit in order for a judgment to be entered for the recovery of costs as per a certificate of taxation. The **Mbaluto J.** held that;

“ . . . the provisions of section 48(3) which were introduced by the Statute Law (Miscellaneous Amendment act (Act number 2 of 2002)) provide:

“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”.

The amendment clearly allows an application under section 51 to seek “an order that judgment be entered for the sum certified to be due with costs: without first having to file a suit.”

5. Counsel also made reference to the case of **Nderitu & Partners Advocate vs. Mamuka Valuers HCCC MILIMANI MISC. APPLICATION NO. 264 OF 2004** which involved a dispute over what constitutes a retainer of an advocate. The court held that:

The definition of a retainer includes or it is synonymous with the word “**employment**”, “**engagement**” or “**instruction**”. The Court further held that if an advocate is instructed by a client, the retainer cannot be in dispute especially where the advocate is instructed in writing and has acted for the client.

6. This application was opposed, counsel for the respondent, **Mr. Issa** relied on the replying affidavit sworn by **Esther Muthoni Passalis** on 14th November 2008. Counsel submitted that the issue of the retainer is disputed. Further there was an agreement entered into in respect of the fees. In this regard there was an objection over the quantum of fees. Under section 51(2) of the Advocates Act, the court is given discretionary powers to enter judgment where a retainer is not disputed. In this case the retainer is disputed thus the provision of section 51(2) of the Advocates Act cannot be invoked. The applicants ought to have filed a substantive suit upon which a judgment can be entered.
7. After the taxation of a bill of costs an advocate is supposed to file a suit for recovery as provided for under section 48(2) of the Advocates Act. In this regard counsel cited the case of **Shamma v Uhuru Highway Development Limited EA LR (2001) 2 EA 528 (CCK)**. In which the Court of Appeal extensively dealt with application of sections 48 and 49 of the Advocates Act and held as follows:

“The proceedings before the High Court Judge were a nullity as the matter had already been fixed for taxation before the deputy registrar and there were no grounds conferring jurisdiction on the Judge to hear the matter and no steps had been taken to divest the deputy registrar of his jurisdiction.”

Rule 13(3) of the Advocates (Remuneration) Order deals with the subject of taxation of costs whereas section 48 of the Advocates act is concerned with the recovery of costs, and the Appellant, having decided to approach the matter by way of rule 13, had no obligation to comply with section 48.

Paragraph 13(3) not being in conflict with sections 48 and 49 of the Advocates act, and section 48 not forbidding the taxation of costs before any action for the recovery of those costs, the superior court had erred in striking out the Appellant’s miscellaneous case”

Lastly counsel argued that the only interest that can be awarded to the applicant is 9% and if the

court were to award 14%, a notice ought to have been issued to notify the respondent that a different rate of interest would be charged

8. The thrust of the issues raised in this application and the issues raised in the opposition require a determination of two issues. Firstly, whether this court can enter judgment as per the certificate of costs and if so, what interest rate should be awarded? Secondly, was the applicant retained as provided for in the Advocates Act? Counsel for the respondent argued vehemently that there was no retainer and parties had entered into an agreement over the legal fees. Several rulings have been rendered in this matter regarding the Advocates Clients Bill of Costs. The ruling by **Lesiit J.** delivered on 7th August 2009, especially page 13 dealt with the issue of whether there was an agreement over the fees. The court held as follows:-

“There is no written agreement fixing the legal fees, clear, specific, unambiguous and certain, and signed by the Client as required under section 45(1) of Advocates Act. The doctrine of estoppel has no application in this case for the same reason. There has been no breach of the intention of the legislature to protect Clients in this case neither has there been any breach of Public Policy as urged by Mr. Issa.”

9. Thus the issue of an agreement was resolved by that ruling. On whether the applicants were retained as advocates for the respondent the facts in this matter speak for themselves. The applicants acted for the respondent in **HCCC MILIMANI CIVIL CASE NO. 131 OF 2008**. There is also ample jurisprudence which guides the court on what elements constitute a retainer. An advocate duly instructed to act for a client and who has acted for the client is retained. In this case I find the applicants were retained for purposes 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 judgment be entered for the sum certified to be due with costs.”

10. In this case the Advocated/ Clients costs payable to the applicants were ascertained by the taxing master who taxed the bill of costs and issued the certificate of costs. Is it necessary for the applicants to file a suit for the recovery of costs? Under the Advocates Act as I understand it, there

are circumstances under which a suit is envisaged to be filed for the recovery of costs payable to an advocate. But that is before the bill of costs has been taxed. This is because under section 48(3) there is a proviso to the effect that a bill of costs may be taxed notwithstanding a suit has been filed.

11. The Advocates Act has not clearly provided the procedure to be adopted to recover the costs after taxation. I am aware that there are two schools of thoughts where parties have filed declaratory suits seeking for judgment and decree to issue as per the certificate of taxation. In other cases parties have moved the court by way of an application as in this matter. Every case should be determined according to its own peculiar circumstances.
12. In the present case, both parties participated in the taxation and they have been involved in several applications. The only avenue for the respondent to challenge the taxation is by way of an appeal as a reference was determined by **Lesiit J** who declined to interfere with the decision of the taxing master. This leaves the respondent with the option of filing an appeal to the Court of Appeal. Meanwhile the certificate of costs has not been altered; it has not been set aside, even if the applicant filed a suit in this matter, a defence by the respondent would be meaningless because judgment would be entered on the basis of the certificate of costs issued.
13. Directing the applicants to file a substantive suit in my humble view would prolong the proceedings; in any case I find no justifiable reasons that can be served by directing the applicant to file a substantive suit. It is also noteworthy that the applicant paid the court fees based on the certificate of taxation. Under section 1(a) of the Civil Procedure Act the overriding objective of the court is to ensure expeditious disposal of the courts business without undue delay or subjecting parties to unnecessary expenses. Being guided by those principles of the overriding objectives in the administration of justice, the facts of this case and the law, I allow this application. I direct the order of taxation issued by the taxing master as per the certificate of taxation dated 8th September 2008 be made a judgment of this court.

RULING READ AND SIGNED ON 12TH FEBRUARY 2010 AT NAIROBI.

M.K. KOOME
JUDGE