



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 33 of 2005

1. SAMMY MAKAU

2. BONFACE NZANGI

3. ALEXANDER MUTINDAAPPLICANTS

VERSUS

B.M. MUNGATA & CO. ADVOCATESRESPONDENT

RULING

1. The Application dated 28.7.2008 seeks orders under Rule 11(4) of the Advocates Remuneration order that leave be granted to enable the Applicants to file an objection to the advocate/client's Bill of Costs in HCCC 70/2001(Machakos)
2. Having read the rival affidavits filed by the parties; one by Alexander Mutinda sworn on 28.7.2008 and another by B.M. Mungata, advocate sworn on 9.7.2009 I wish to state as follows;-
3. Firstly, I note that the Bill of Costs was taxed on 13.10.2005 and the Applicants only filed the present Application on 29.7.2008. The delay is explained as arising from a change of advocates when one, Daniel Maanzo, advocate was appointed a civil servant having taken up the matter on 3.4.2007 from M/S Sheth and Wathigo Advocates, then acting and that Mr. Maanzo had failed to prosecute a Notice of Preliminary Objection filed on 12.5.2005.
4. From the record, M/S Sheth & Wathigo were served on 6.10.2005 to attend the taxation of the Bill of Costs on 13.10.2005 and when they failed to attend, the Bill of Costs was taxed at Kshs. 584,715.40. It is unclear why they failed to attend and it is unclear why it took the Applicants upto April 2007 to instruct another advocate to act but I note that the address for Sheth & Wathigo is the same as the one for Maanzo & Co. advocates and as appearing on the record it is;

“Windsor House, University Way

P.O. Box 40100-00100

Nairobi”

5. However, having so said, I take the view in the circumstances of this case, that I shall not visit the mistake of an advocate on the client, more so in a matter involving an advocate/client relationship which has obviously broken down.

6. Secondly, I note that the contested Bill of Costs arises from legal service rendered in HCCC 70/2001(Machakos). A Certificate of Taxation was later issued by the Deputy Registrar, Machakos on 24.3.2004 and costs were apparently then taxed at Kshs. 765,990/= but on 15.12.2004, the advocates for the parties recorded a consent order to the effect that the party and party Bill of Costs filed on 10.2.2003 be taxed in the sum of Kshs. 366,600/= and that in the contested Bill of Costs, the Respondent took into account that sum in demanding Kshs. 549,900 /= from the Applicants. The issue whether the contested (*and latter Bill of Costs*) is res judicata has been raised by the Applicant and I can only note that the issue is not moot but I will not determine it because that is not my role presently.
7. Thirdly, there is the issue of CMCC No. 157/2008 (Machakos) a suit in which the Respondent has sought to enforce the payment of the balance of his fees. Apparently, judgment was entered in favour of the advocate who then proceeded to enforce payment of Kshs. 236,759/= which was the decretal sum as at 1.9.2008. Alexander Mutinda has already paid Kshs. 100,000/= to secure his release from civil jail in execution thereof. There is no appeal pending from that judgment and that presumes that the applicants have no quarrel with it.
8. With all these matters obtaining, should I grant the orders sought? Sadly I will not because once the Bill of Costs was taxed, a suit filed to enforce it and all this time, aware of the implications thereof, the Applicants have done, nothing save to pay part of the sum to the Respondent, any discretion and sympathy that I may otherwise have directed to them will be held back.
9. Lastly, in other circumstances, I would have been quite happy to open the doors of justice to the Applicants to object to the Bill of Costs but presently there is nothing to object to and I have said why.
10. The Application dated 28.7.2008 is misguided and is dismissed with costs.
11. Orders accordingly.

ISAAC LENAOLA

JUDGE

Countersigned and delivered at **Machakos** this **19th** day of **March 2010**.

H.P.G. WAWERU

JUDGE