



Kiplagat and Associates v National Housing Corporation (Miscellaneous Civil Case 128 of 2005) [2009] KEHC 2145 (KLR) (21 August 2009) (Ruling)

KIPLAGAT AND ASSOCIATES V NATIONAL HOUSING CORPORATION [2009] eKLR

Neutral citation: [2009] KEHC 2145 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

MISCELLANEOUS CIVIL CASE 128 OF 2005

MK KOOME, J

AUGUST 21, 2009

BETWEEN

KIPLAGAT AND ASSOCIATES PLAINTIFF

AND

NATIONAL HOUSING CORPORATION DEFENDANT

RULING

1. Several rulings have been rendered in this matter regarding the advocate/client bill of costs. The latest ruling is by Kimaru J. which was delivered on 25th February 2009. In that ruling, the decision by taxing master was up-held. The application that is before me now, dated 14th May 2009, by way of a Notice of Motion is brought under the provisions of Section 51(2) of the *Advocates Act*. The applicant seeks for an order that judgment be entered against the defendant in the sum of Kshs.23, 160,106.95 together with interest at court rates from the date of taxation of the advocate's bill until full payment.
2. This application is premised on the grounds that the advocate's bill of costs was taxed, and a certificate of taxation dated 3rd May, 2006 was issued. The clients challenged the order of taxation by way of a reference, but the reference was dismissed on 25th February, 2009. The client applied for leave to appeal against order of dismissal of the reference, but the 60 days within which the appeal was to be filled have also expired. The respondent has also not applied for proceedings in order to lodge the appeal.
3. The application is further supported by the affidavit of Mr. Kenneth Kiplagat who was the advocate in the matter. Mr. Kiplagat further argued that under Section 51(2) of the *Advocates Act*, the advocate is entitled to a judgment because he has fulfilled the three conditions set out under the above provision. Firstly, he is supposed to show a certificate of taxation issued by a taxing officer. The certificate has not been challenged because the reference filed by the client against the taxation was dismissed on 25th February, 2009.



4. Secondly, the advocate is supposed to prove that there is no dispute regarding instructions by the client. Mr. Kiplagat submitted that there is no dispute because the client annexed a copy of the instructions in its replying affidavit by way of a letter dated 06th March, 1998. Thirdly, there is no order of stay of proceedings either from this Court or from the Court of Appeal.
5. Mr. Kiplagat made reference to several decisions of this Court, in the matter of; Nderitu and Partners Advocates versus Mamuka Valuers Milimani Miscellaneous Application No.463 of 2004. In that matter there was a dispute over what constitutes a retainer. 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 an advocate is instructed by a client, the retainer cannot be in dispute especially where the advocate is instructed in writing. Counsel also relied on the decision found in the case of; Owino Okeyo & Company Advocates Versus Pelican Engineering & Construction co. Ltd Milimani Miscellaneous Application No.156 of 2003. In that case, Azangalala J explained the meaning of the word retainer and borrowed from the decision in the case of; Ezekiah Ogawo Abunya Versus Kuguru food Complex Ltd. Nairobi High court Miscellaneous Application NO.400 of 2001 (UR). In that case Ringera J. (as then was), rendered himself at page 7 of the ruling as follows:-

“I am persuaded that the word retainer as used in Section 51(2) of the *Advocates Act* is synonymous with “employment”, “engagement”, or “instruction”. An advocate duly instructed is retained and where there is no dispute that an advocate was duly instructed by the client in any mater, the retainer cannot be said to be in dispute.”
6. On the replying affidavit counsel urged the court to disregard the issues raised because they were the same issues dealt with when the matter was heard as a reference, those issues are res judicata and they cannot be agitated during this application. The party and party bill of costs was taxed and the client benefited from the costs. The issue of the quantum of the fees payable is not within the preview of this court.
7. This application was vigorously opposed by counsel for the client Mr. Nderitu, who relied on the replying affidavit sworn by William K. B. Keitany a senior legal officer with the client. Counsel submitted that the only condition which is in dispute is whether there was a retainer and the terms of the retainer. The issue of the retainer ought to be resolved under the provisions of Section 51(2) of the *Advocates Act*. It is not in dispute that Mr. Kiplagat was instructed by the client but the instructions were limited because there was another suit over the same subject matter where the client engaged the firm of the Wetangula & Company Advocates to defend the suit generally and on 14th April, 1992, the Nairobi City Commission and the Client entered into a consent and colossal sums of money was paid to the firm of Wetangula & Company.
8. Sometimes again in March 1995 the client instructed the firm of Ngatia and Associates, to act for the enforcement of the payment withheld by the Nairobi City Commission. The advocate was paid Kshs.1, 600,000/= as fees on 19th May, 1995. On 6th March, 1998, the client instructed the firm of Kiplagat to file a suit in court and apply for restraining orders. In that case the firm of Kiplagat filed a party and party bill of costs which were taxed and Dr. Kiplagat was paid Kshs.250,000/= for the work.
9. Counsel therefore urged the court to find that, most of the work for which the advocate is seeking to be paid, was done by another firm and they were duly paid and not to enter judgment, so the issue of retainer can be resolved by the court of appeal. This matter has been pending for a long time but the cause of delay can be attributed to both parties. The court is also to blame for the delay because the court record is not clear when the ruling by the taxing officer was delivered.



10. Having set out the summary of the rival submissions, this application as it is expressed, is brought under the provisions of Section 51(2) of the Advocates Act, the specific provisions are 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”.

11. There is no dispute that a certificate of costs was issued after the advocates/clients bill of costs was taxed. The client being aggrieved by the decision of the taxing master filed a reference which was dismissed by Kimaru J vides the ruling delivered on 25th February, 2009. The only point of departure as submitted by Mr. Nderitu is that the instructions given to the advocate were limited and costs taxed and sought as judgement to be paid to the advocate, were paid to other advocates for services rendered by other advocates.

12. The instructions to the advocate are contained in the letter dated 6th March, 1998 which was addressed to the advocate as follows:-

“Dear Sirs,

13. RE: H.C.C.C NO.944 OF 1992 – NAIROBI CITY COMMISSION – VS – NATIONAL HUSING CORPORATION

14. Further to our discussion on 5th March, 1998 in connection with the above matter we would like you to proceed to court as a matter of urgency and obtain orders restraining the Nairobi city Council from interfering with our collection of rent from Madaraka and kariokor tenants.

Yours faithfully,

F. W. Mbugua (Mrs.)

For: Managing Director.”

15. My duty in this matter as I understand it, is not to determine the quantum of the fees payable to the advocate. That has already been determined by the taxing master and Judge who determined the reference. Mine is only to establish whether there was a retainer. Going by the contents of the letter under reference, the advocate was instructed to proceed to court as a matter of urgency and obtain restraining orders against the Nairobi City Council from interfering with collection of rent from Makadara and Kariokor tenants.

16. The pith and breath of the instructions given by the client to the advocate were matters of the taxing master and the reference. As far as the provisions of Section 51(2) are concerned, the advocate was retained and I find no justifiable reason why judgment should not be entered for the sum certified to be due to the advocate.

17. In this matter the advocate acted for himself, therefore he is not entitled to costs. Judgment is hereby entered for the advocate in the sum of Kshs.23,160,106.95 with interest at court rates from 3rd May, 2006.

RULING READ AND SIGNED AT NAIROBI ON 21ST AUGUST, 2009.

M. K. KOOME



JUDGE

