



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Miscellaneous Civil Application 552 of 2008

**IN THE MATTER OF: THE ADVOCATES ACT AND IN THE MATTER OF THE
ADVOCATE'S REMUNERATION ORDER**

AND

IN THE MATTER OF: BY-LAWS AGAINST KENYA PORTS AUTHORITY

AND

IN THE MATTER OF: TAXATION OF ADVOCATE/CLIENT BILL OF COST

BETWEEN

J. M. MBURU ADVOCATES.....APPLICANT

AND

THE MUNICIPAL COUNCIL OF MSA.....RESPONDENT

RULING

This is an application brought under Orders XI Rule 1 (a) and XXIV Rule 6 (1) and (2) of the Civil Procedure Rules. The order for consolidation of Miscellaneous Application Numbers 552 and 553 of 2008 has already been made. The orders now sought are as follows:-

- (a) That the parties hereto having settled the two causes for Kshs. 23.6 million, the said settlement be recorded.**
- (b) That judgment be entered in favour of the applicant against the respondent for the said sum of Kshs. 23.6 million less Kshs. 1.6 million paid by the respondent leaving a total of Kshs. 22 million.**
- (c) That the respondent do pay the balance of Kshs. 22 million together with interest at the rate of 14% p.a. from 24th June 2008 in two equal monthly instalments commencing on 30th June 2009 and the second and last one on 30th July 2009.**

(d) That in default of payment of any one instalment on its due date the respondent's Town Clerk be committed to Civil Jail or such other order be made by the court for implementation or execution of the judgment.

The application is made upon the grounds that the parties have compromised the two suits at Kshs. 23.6 million and on the mode of payment which the applicant wishes endorsed and enforced.

The application is supported by an affidavit sworn by the applicant/advocate in which it is deposed, *inter alia*, that the applicant's bills of costs' were taxed in various sums but after discussion the costs were agreed at Kshs. 23.6 million and a payment mode reached, but that the payment mode was not honoured by the respondent. The application is opposed and there is a replying affidavit sworn by Tubman Otieno, the respondent's Town Clerk. It is deposed in the affidavit, *inter alia*, that there has been no settlement on the applicant's costs but to the contrary, the taxation of the same has been challenged by references which references are yet to be determined. It is further deposed that payments made to the applicant are in respect of other matters but not in settlement of agreed fees in this matter. The respondent's advocates have also filed grounds of opposition in which they state, in the main, that no compromise has been reached by the parties herein and no judgment can therefore be entered in favour of the applicant against the respondent.

The applicant has filed a supplementary affidavit in which he substantially reiterates the position taken in the supporting affidavit.

When the application came up before me for hearing on 17th July 2009, counsel agreed to file written submissions which were in place by 21st August 2009. I have considered the application, the affidavits filed, the Grounds of Opposition and the submissions of counsel. Having done so, I take the following view of the matter. The applicant has moved the court under the provisions of Order XXIV Rule 6 (1) and (2) of the Civil Procedure Rules. Rule 6 (1) is in the following terms:-

"6. (1) Where it is proved to the satisfaction of the court and the court after hearing the parties directs that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall, on application of any party order that such agreement compromise or satisfaction be recorded and enter judgment in accordance therewith."

Under the sub-rule, the applicant had to prove to the satisfaction of the court that the suit has been adjusted wholly or in part by a lawful agreement or compromise. In this regard, the following averments of the applicant in his affidavit in support of this application are significant.

"11)

However, I and Mr. Muthama agreed that owing to the acrimony which had surrounded the matter since the applicant filed its Bills of Costs, the consent letter would be executed by both parties and their respective advocates.

12)

The consent letter contains certain alterations which were made by myself and the applicant's advocate. At the time the alterations were made, it was not anticipated that the matters would revert to court and it was assumed that they had been settled once and for all. The alterations are therefore sincerely regretted.

13)

And we duly made the same (amendments) and prepared a fresh consent letter which we proceeded to send to the respondent's advocates by courier service."

I have perused the copy of the draft letter of consent and the amended version of the same. None of them is signed by any of the parties. I have perused copies of cheques and vouchers made in favour of the applicant by the respondent. The same may have been made pursuant to some arrangement made between the respondent and the applicant but cannot, in my view, be the foundation of a compromise to be given effect to by the court. I have further considered annexure "MM4", being a letter addressed to the respondent by its advocates and copied to the applicant's advocates. The letter refers to a meeting between the advocate, his assistant and the respondent's Town Clerk in which the advocates were instructed to settle the two matters in the sum of Kshs. 23,600,000/=. The letter enclosed a draft consent order for perusal and approval of the Town Clerk. As it turned out, the approval does not seem to have been given. The instructions to settle as stated were therefore not crystallized. It would of course have been another matter altogether, if the said advocates had informed the court that the matters be settled as instructed and the settlement had been recorded. In that event, it would have been nigh impossible for the respondent to renege from the compromise since its advocate would be taken to have had general authority to compromise on behalf of his client. But as the advocate was seeking his client's approval of the consent which was eventually not given, his statement in the said letter that he had instructions to settle the matters cannot bind the respondent.

This case is distinguishable from the case of **Lochab Transport Limited – v – Kenya Arab Orient Insurance Limited [1986] e KLR**. In that case, the defendant had agreed to settle the plaintiff's claim which agreement was evidenced by a discharge voucher. There is no such agreement in this case.

The material availed to the court suggest that the parties indeed strenuously strived to reach a settlement or compromise but did not quite reach one. The correspondence exchanged did not, in my view, crystallize into a lawful agreement or compromise upon which the applicant could have sought judgment. There was in other words no meeting of minds.

In the result, the applicant is not entitled to the reliefs sought in paragraphs 2, 3, 4 and 5 of the Notice of Motion dated 16th June 2009. The application is therefore dismissed save for prayer one which was allowed by consent. In view of the previous relationship of the parties, I make no order as to costs. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF SEPTEMBER 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Sewe for the Respondent and Mwaniki for the Applicant.

F. AZANGALALA

JUDGE

17TH SEPTEMBER 2009