



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
Miscellaneous Civil Application 73 of 2009
J.M. WAFULA & CO ADVOCATES.....APPLICANT
VERSUS
KIPROP KANDA.....RESPONDENT

RULING

By a Notice of Motion dated 28th September 2009, pursuant to the provisions of section 51(2) of the Advocates Act (Cap 16) Laws of Kenya and Rule 7 of the Advocates Remuneration Order, the applicant seeks orders:

1. That judgment be entered for the applicant as against the respondent for the sum of Kshs.584,389/- being the certified costs due to the applicant that was issued on 6/7/2009.
2. That the respondent do pay to the applicant interest on the certified costs at 9% per annum from 6/7/2009 being the date of taxation and thereafter at court's rate until payment in full.
3. That costs of this application be borne by the respondent.

The application is based on the grounds:

- (a) That the advocate-client costs due to the applicant herein have been taxed at Kshs.584,389/- and a certificate of taxation issued to that effect.
- (b) That there is no dispute that the respondent had retained the applicant herein as its advocates, in respect of which retainer advocate-client costs were duly taxed.
- (c) That it is only fair and just, in the circumstances that judgment be entered for the sum certified to be due to the applicant herein.

The application is predicated upon the annexed affidavit of James Masai Wafula sworn on the 28th day of September, 2009.

On behalf of the applicant, it was argued that he is an advocate of the High Court of Kenya and duly represented the respondent both in the High Court and the Court of Appeal at Kitale in HCC No.128/98 and Eldoret Court of Appeal C.A No. 219/2003.

After the close of the two aforesaid cases, he prepared a bill of costs dated 9th December 2008 in respect of the two matters.

The bill of costs was taxed and certified by the taxing officer on 6th July 2009 as per exhibit "JMW1".

That he served the bill of costs on the respondent, together with the Notice of Taxation and the hearing dates but the respondent failed to attend court for the hearing. That todate the said certificate of costs has not been set aside by the court and hence final as costs duly assessed todate.

That since the taxation the respondent has not paid to him any sum hence the sum of Sh.584,389/- is still due and owing from the respondent to her. That the retainer is not disputed by the respondent. Accordingly it is in the interest of justice that

judgment be entered for the sum certified to be due together with interest and costs.

Section 48(1) of the Advocates Act (Cap 16) Laws of Kenya provides as follows:-

“Section 48(1) subject to this Act, no suit shall be brought for the recording of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause, to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limit of the courts jurisdiction, in which event action may be commenced before expiry of the period of the month”.

(2) subject to subsection (2), a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction.

(3) notwithstanding any other provision 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”

In the present case, there is evidence that taxation has already been done, hence section 48(1) has duly been complied with. Subject to compliance with section 48(1) an advocate may bring suit for the recovery of his costs (section 48(2)).

In the premises it is incumbent upon the applicant herein to file suit (plaint). Flowing from the judgment on the suit a decree shall be issued which may be executed at the instance of the applicant.

In the present case, I have no suit before me. What is before me is a mere Notice of Motion. From a Notice of Motion only an order shall ensue. That order is not capable of being executed. The applicant has made a false start. Accordingly I strike out the motion herein but grant leave to the applicant to file an appropriate suit for recovery of the costs. There shall be no order as to costs.

Dated and delivered at Kitale this 1st day of December, 2009.

**N.RO. OMBIJA
JUDGE**

Mr. Kiarie for Anne Kibe for Applicant.