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

Misc Civil Appli 48 of 2002

OWINO OKEYO & COMPANY ADVOCATES……...……APPLICANT

VERSUS

PELICAN ENGINEERING & CONSTRUCTION

COMPANY LIMITED….....RESPONDENT

RULING

The application before me is the Notice of Motion dated 10th April, 2006. It is brought under Section 51(2) of the Advocates' Act and Order 50 Rule 1 of the Civil Procedure Rules. The application seeks that:-

"**Judgement be entered for the applicant against the Respondent for the sum of Kshs.341,925/= being the amount certified to be due by the Deputy Registrar of this court on 16th May, 2005. and that the Applicant be awarded interest at 9% per annum from 6th September, 2001 until payment in full".**

The application is supported by the affidavit of **Mr. Stephen Omondi Owino** an Advocate of the High Court of Kenya. He avers that the applicant was duly instructed by the Respondent to act for and represent in HCCC No.40009/94. On 28th January, 2002 the applicant lodged an Advocate/client Bill of Costs for taxation against the Respondent. And that the said bill was on 10th May, 2005 taxed by the Deputy Registrar in favour of the Applicant against the Respondent. The Advocate then exhibited a copy of the certificate of taxation. It is alleged that the Applicant then made a formal demand for the taxed costs, which the Respondent failed to pay.

The Applicant further contends that there is no appeal or application to alter, vary or set aside the said taxation by the Respondent, therefore the court has powers under Section 51(2) of the Advocates Act to make the certified costs as a judgement of the court.

The Respondent filed a replying affidavit through **Mr. Mike Maina** who depones as follows: that the Respondent does not dispute the taxed costs of Kshs.341,925 awarded to the applicant. But the Respondent contends that the taxed costs awarded have already been settled and form part of an aggregate sum of Kshs.5,550,800/= paid to the Applicant on account in respect of various matters it handled for the

Respondent.

It is also the case of the Respondent that it moved to court on 25th October, 2001 through Nairobi HCCC No.1574/2001 (OS) seeking an order of accounts to determine the entire sums paid to the Applicant as legal fees against the sum of Kshs.5,550,800/=. And so that any taxed amount may be set off against that sum. And that in any case the said matter is still pending hearing and determination on merit, therefore this application ought to be dismissed to await the outcome of that matter.

Mr. Owino for the Applicant submitted that there is no dispute as to retainer and the sum claimed against the Respondent has not been settled. He contended that his firm conducted various matters for the Respondent and that indeed some monies were paid. The money was paid per file, as the Applicant were handling over 40 files/matters on behalf of the Respondent. He equated to the position taken by the Respondent as legally wrong. According to **Mr. Owino** Advocate the Respondent have taken all monies paid to the Applicant and they want to deduct any taxed bill from that global sum, which they had paid. He contended that each payment was specific to a particular case which the Applicant were handling for the Respondent. The Advocate for the applicant relied on:-

(1) Misc. application No.156/2003 Owino Okeyo & co. Advocates vs Pelican Engineering & Construction (unreported), where Azangalala J held;

"**That Section (red 51(2) of the Advocates Act) in my understanding gives the court the jurisdiction to enter judgement for taxed costs where two conditions are satisfied. The first condition is that there must be a certificate of the taxing officer by whom the bill has been taxed, which certificate has not been set aside or varied by the court. If those two conditions are satisfied the court has discretion to enter judgement for the sum certified to be due with costs…."**

Turning back to the matter at hand the Respondent, in the replying affidavit of Mike Maina aforesaid, does not dispute the taxed costs of Kshs.309,895/=. The Respondent's contention is that the costs have already been settled. Those depositions in my view are clear admissions that the Respondent instructed the Advocates. In other words the Respondent retained the Advocates. That being the position, in my view there is no dispute as to the retainer".

In that case the parties were the same and the dispute was the same as the present matter save that the figures were different. The cause of action of the Applicant and the defence of the Respondent is quite similar to the case decided by my brother Justice Azangalala. The judge came to the conclusion that the applicant had satisfied the conditions set under section 51(2) of the Advocates Act. It was also the position of the judge that the existence of Nairobi HCCC No.1574/2001(OS) would not disentitle the applicant to judgement. The Judge also expressed his concern that HCCC No.1574/2001 was filed in the year 2001, while the certificate of taxation for his decision was issued on 29.4.2003.

Section 51(2) reads:

"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 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 judgement be entered for the sum certified to be the costs".

The question is whether this case is a fit to benefit from the provision of the above section. Here the Applicant has exhibited a valid and proper certificate of the taxing officer dated 16th May, 2005. It is not the case of the Respondent that they did not participate in the hearing and determination of the said taxation. The certificate of taxation dated 16th May, 2005 has not been challenged by the Respondent. In fact there is no appeal or application to vary it or set it aside, therefore it can be rightly stated that the certificate of taxation dated 16th May, 2005 is a true representation of the Advocate/client bill of 10th May, 2005. The amount in that certificate is final and conclusive as to the figure due and payable between the Advocates and client.

The Applicant applied for taxation of a bill for service which has been rendered. In the taxation the Applicant and Respondent were given ample opportunity to contest and challenge the particulars of the bill. And it is after that contest that the taxing master arrived at the sum of Kshs.341,925/- in favour of the applicant. And as a result of that taxation, the taxing master issued a certificate of taxation for the amounts due and payable by the client. The position I take is that a certificate of the taxing master is absolute and final as to the amount of costs awarded therein, unless a party exercises its right under Rule 11 of the Advocates Remuneration Order. It means a person aggrieved has the right to file a reference before a Judge within the stipulated time.

If I got Mr. Njenga learned counsel for the Respondent right, he is saying that retainer is not disputed but the client has paid the taxed costs, therefore this application is unmeritorious and should be dismissed. The issue of accounts which is pending is essential and material to the present determination. What the client is saying is that it has paid monies on account of its relationship with the Advocates but which is not considered in the taxation.

I think it is clear to me, that the Respondent did not raise the kind of defence it is putting up in this application before the taxing master. I believe at the taxation stage, the respondent were required to put forward all material and/or evidence necessary for the determination of the dispute. The client in this case does not dispute the amount of the bill awarded to the Applicant. The position taken by the Respondent is that the taxed costs of Kshs.341,925/= have already been settled and that the same forms part of an aggregate sum of Kshs.5,550,000/= paid to the Advocates on account in respect of various matters it handled for the Respondent. That may sound legitimate and valid but where is the evidence of such payment and/or settlement.

I think if the issue of settlement and/or payment was brought to the attention of the taxing master, he/she would have put great emphasis on such important and pertinent issue between the parties. It was incumbent upon the Respondent to raise such issues backed by imperial evidence to boot. The powers of the taxing master is clear and elaborate under Rule 13A of the Advocates Remuneration Order, which states:

"For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses to administer oaths, to direct the production of books, papers and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter or dispute before him".

The Respondent has no dispute, complaint and/or objection to the bill as taxed. But my understanding is that the Respondent is saying that *"I have paid for all monies due and owing in a global sum paid to the Advocates on account"*. The appropriate procedure to dispose such an argument is provided for under Rule 13A of the Advocates Remuneration Order. That rule gives the taxing master wide and unfettered discretion to resolve such disputes as to the exact amount payable. The Respondent participated and had an opportunity to present such complaints before the taxing master. The authority and powers given to a taxing master to summon witnesses, to direct the production of books and documents has not been used by the Respondent. It did not raise the kind of defence that is now raised before this court.

The issue of accounts is a matter which could have been raised before the taxing master. It was not raised. And there is no complaint that the taxing master did not take into consideration essential issues that were meant for determination. The powers given under Rule 13A is exhaustive to accommodate parties willing to bring before it complaints of accounts and even satisfaction of the bill. What in essence the Respondent is saying is that it had satisfied the bill and all monies due. It was entitled to raise such issues and questions before the taxing master. I am sure the taxing master would have called for documents and examination of such evidence between the parties. The Respondent cannot now contest matters that were not brought to the attention of the court at the earliest opportunity. Both parties attended and were heard before the taxing master. But the Respondent opted not to raise the current issues that are raised before me.

There is no indication that the taxing master failed and/or neglected to consider the issues of accounts and

verification of the same. The Respondent also did not challenge the decision of the taxing master under Rule 11 of the Advocates Remuneration Order. I agree with my brother Justice Azangalala that the existence of HCCC No.1574/2001 would not disentitle the applicant to judgement. No attempt to stay the taxation of costs till the hearing and determination of HCCC No.1574/2001 has been made by the Respondent. The fact that the Respondent filed Misc. Nairobi HCCC No.1574/2001 is not a bar to enter judgement in favour of the Applicant. The rights of the parties in that case has not been determined. If the Respondent is entitled to any right then it has not matured to restrict the entering of judgement in favour of the applicant. The fact that the Respondent took no steps to finalize HCCC No.1574/2001 speaks of volumes about its merit or chances of success.

Having given this matter my utmost consideration, I am satisfied that the applicant is entitled to judgement.

I therefore, enter judgement as prayed in the application plus costs and interest.

Dated and delivered at Nairobi this 9th day of March, 2007.

M. A. WARSAME

JUDGE