

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Misc Civil Appli 230 of 2002 & 37 of 2006

MUTHOGA, GATURU & CO. ADVOCATES.....APPLICANT

Versus

JOSEPH WARURI GITHUKU.....RESPONDENT

AND

MISCELLANEOUS CIVIL APPLICATION NO. 37 OF 2006

MUTHOGA GATURU & CO. ADVOCATES.....APPLICANT

Versus

CENTRAL SERVICE STATION.....RESPONDENT

RULING

The application before court are two in two different files. In respect of Misc. No. 230 of 2002 it is dated 29th January 2007. In respect of Misc. 37 of 2006 it is dated 5th March 2007. Counsels appearing for the Applicant and the Respondent adopted their arguments in both files relating to both applications. Their applications are brought under *Section 51 (2)* of the Advocates Act. They both seek the entry of judgment for the taxed costs in both matters. The argument of both Applicants in both matters is that the costs were taxed, a certificate of taxation was issued and to-date that certificate of costs has not been set aside or altered. In that regard the Applicants sought that judgment in accordance with the certificate of costs be entered as prayed. The application was opposed. In opposition the Respondent's counsel in reliance of *Section 48* and *49* of the Advocates Act argued that the application is incompetent for the Applicant can only obtain judgment on filing suit for recovery of the taxed amount. The Respondent's advocate further argued that the matter before court was *res judicata* because the same had been argued before the Deputy Registrar.

In considering this ruling I wish to begin with the last argument of the Respondent. I confirm that I have perused the proceedings particularly in Misc. No. 230 of 2002 and I find that the Deputy Registrar in his ruling found that he had no power to entertain the application and directed the parties to take a date for hearing before the judge. I therefore find that the application is not *res judicata*. In respect of the other argument raised by the Respondent, the finding of this court is that *Section 48* and *49* relate to the recovery of costs that have not been subjected to taxation. Once the costs are subjected to taxation *Section 51 (1)* and *Sub section (2)* comes into play. That section provides as follows:

- (1) *Every application for an order for the taxation of an advocate's bill or for the delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.*
- (2) *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.

In respect of that section the Hon. Justice Visram in the case Misc. Civil Appl. No. 651 of 2004 between **OWINO OKEYO & CO. ADVOCATES -V- MIKE MAINA & MUTHITHI INVESTMENTS CO. LTD.** had the following to say:

In my view, the Section is applicable where there is no dispute about the “retainer”. In that situation, it makes it expedient, and less costly, for the advocate to obtain a quick Judgment. And that, I believe, is the purpose of that Section – that in clear cut situations where there is no dispute about the retainer, and the bill of costs has been taxed, it would be highly unjust to require the Advocate to file suit for the recovery of his fees.

I am wholly in agreement with that finding. Indeed unless and until a certificate of taxation is set aside or altered, the costs thereof are final as to the amount of costs recoverable. That being the case the Applicant is entitled to apply for judgment to be entered in respect of those costs which as the law states are final costs. I do find therefore that the Plaintiff’s applications are merited and I grant the following orders:

1. In respect of Misc.230 of 2002, judgment is hereby entered for the Applicant for the sum of Kshs.96,452/= with interest at court rate with effect from 24th December 2002 until payment in full. The Applicant is also granted costs of the Notice of Motion thereon dated 29th January 2007.
2. In respect of Misc. 37 of 2006 judgment is hereby entered for the Applicant for Kshs. 141,137.26 plus interest at court rate with effect from 30th January 2007 until payment in full. The Applicant is also awarded the costs of the Notice of Motion dated 5th March 2007.

Dated and delivered at Nyeri this 20th day of July 2007.

MARY KASANGO

JUDGE