



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE 123 OF 2006 (OS)**

**STEPHEN M. MUCHIRI.....PLAINTIFF**

**VERSUS**

**RUBUA N. NGURE *t/a* NGURE & CO. ADVOCATES.....DEFENDANT**

**RULING**

The plaintiff, Stephen M. Muchiri has brought an originating summons under the provisions of **Order LII Rules 4(1) and (2)** of the **Civil Procedure Rules** seeking to compel the defendant, Rubua N. Ngure *t/a* Ngure & company Advocates, to pay him the sum of Ksh.172,078/= which he claims were costs paid to the defendant on his account in a successful suit. The grounds in support of the originating summons are that the plaintiff contends that he had instructed the defendant to act on his behalf in a Civil Suit *i.e.* Nakuru HCCC No.349 of 1996, to recover a certain sum owed to him. The plaintiff states that the suit was successful. The defendant was paid the costs of the suit in the said suit but had refused to surrender the balance of Ksh.172,078/=. The plaintiff prayed the court to compel the defendant to pay him the said costs awarded together with interest from the 11<sup>th</sup> February, 2002 until the payment in full of the decretal amount. The originating summons is supported by the annexed affidavit of the plaintiff.

The originating summons is opposed. The defendant Rubua N. Ngure has sworn a replying affidavit in opposition to the application. He admits that he was instructed to act on behalf of the plaintiff in a suit. The suit was successfully prosecuted. The party to party costs were assessed at Ksh.484,055/=. The defendant deponed that he filed his advocate-client bill of costs between him and the plaintiff and the same was taxed at Ksh.255,735/= by the Deputy Registrar of court. The defendant deponed that he unsuccessfully sought to have the said ruling reviewed. He further deponed that he had filed an application before the High Court seeking an extension of time to enable him object to the decision of the Deputy Registrar in taxing the said Advocate-client bill of costs. The defendant did not however depone what the fate of the application was. The defendant was of the view that the plaintiff in actual fact owed him Ksh.669,997/50 as legal fees. He deponed that the plaintiff was in effect seeking to benefit from his professional work as an advocate. He urged the court to disallow the originating summons.

The parties to the originating summons agreed by consent to dispose off the summons by making oral submissions. At the hearing of the summons, Mr. Mugambi, counsel for the plaintiff submitted that the decretal sum which was awarded in the suit was Ksh.1,664,710/= out of which the advocates bill of costs was taxed at Ksh.255,737/=. He submitted that the plaintiff had received the sum of Ksh.1,293,000/= less a further sum of Ksh.56,105/= which the defendant had recovered as legal fees. Mr. Mugambi maintained that the advocates fees payable to the defendant was Ksh.199,632/=. In his view, the defendant ought to refund the plaintiff the sum of Ksh.172,078/=. He submitted that the only issue for determination was whether the advocate's fees ought to be based on the consent or the certificate of costs filed by the defendant. Mr. Mugambi contended that the defendant had made an election when he sought to have the advocate-client bill of costs taxed. In his view, the defendant was bound to be paid the amount that was taxed and not any other amount that the defendant could be claiming. He submitted that there was no Advocate-client bill of costs pending taxation as between the plaintiff and the defendant. He urged the court to allow the originating summons with costs.

Mr. Okeke for the defendant opposed the originating motion. He argued that the only issue for determination was whether the costs of the defendant should be assessed in accordance with the consent or in accordance with the advocate-client bill of costs which was taxed. He submitted that an advocate who acts in a matter is entitled to recover costs either on the basis of the party to party costs or on the basis of the taxed costs. He submitted that in the present case, the fact that the advocate had opted to have the advocate-client bill of costs taxed, did not preclude him from claiming his fees based on the party to party costs awarded by the court. He urged the court not to find that the defendant had made an election when he made the decision to have the advocate-client bill of costs taxed and was therefore not bound by it. He prayed for the originating summons to be dismissed with costs.

I have carefully considered the rival submission made by the parties to this application. I have also read the pleadings filed by the parties to this application including the affidavits sworn in support each party's respective position. The issue for determination by this court is whether the plaintiff is entitled to be paid the sum of Ksh.172,078/= plus interest and costs which he claims was the balance of the taxed party to party costs which was due to him. Certain facts are not in dispute in this case. It is not disputed the plaintiff had instructed the defendant to act on his behalf in Nakuru HCCC. No.349 of 1990 between Stephen M. Muchiri (the plaintiff in this case) and Ndeffo Company Ltd. The plaintiff was successful in the suit and was awarded the sum of Ksh.1.18 million. The party to party costs were taxed at Ksh.484,055/=. By his own admission, the plaintiff paid the defendant instruction fees of Ksh.56,105/=.

There is no evidence that the plaintiff paid any other sum to the defendant as legal fees. There was no evidence that the plaintiff and the defendant entered into an agreement either before or after the filing of the said suit on the amount of the legal fees that would be paid. There is therefore no agreement as envisaged by **Section 45(1)** of the **Advocates Act** which can be enforced by this court. Upon evaluating the argument made this originating motion, it is apparent that the plaintiff is basing in claim on the party to party costs which were taxed as between him and the defendant in Nakuru HCCC No.349 of 1996. The party to party costs which taxed cannot by any stretch of imagination be said to be the legal fees which the plaintiff had agreed to pay to the defendant. Party to party costs involves an element of work done by the advocate which, of necessity, will not have to be repaid to the client in the event that a suit is successfully prosecuted. The client would only be entitled to be paid or be refunded the legal fees that he paid to his advocate.

In the present case, the plaintiff stated that he paid the defendant the sum of Ksh.56,105/= as instruction fees. He did not pay the defendant any further sum. As stated earlier, there was no agreement between the plaintiff and the defendant relating to the legal fees that would be paid to the defendant. It appears that the plaintiff mistakenly thought that he was entitled to the entire sum of Ksh.484,055/= which was taxed as party to party costs in the said suit. It is the view of this court that the said taxed party to party costs appear, on the face of it, to be exaggerated. Since the defendant in that case agreed to pay the said costs, it is not up to this court to judge the legality or otherwise of the said awarded party to party costs. I think the only amount that the plaintiff would be entitled to, upon the successful conclusion of a case, was the amount which was agreed as legal fees to be paid or in the event of a disagreement, the amount taxed in an Advocate-client bill of costs. A client is not, automatically, entitled to all the costs which are assessed as party to party costs.

In the present case, the defendant did more than what was expected of him when he paid to the plaintiff a sum more than what he was originally paid as legal fees. In the absence of a written agreement, the plaintiff is only entitled to the amount which in this case is the advocate-client taxed bill of costs *i.e.* Ksh.255,737/=. The plaintiff was paid more than this amount by the defendant. He is not entitled to anything more. In fact, the plaintiff should be grateful that the defendant acted in the matter and successfully concluded the suit after being paid a paltry sum of ksh.56,105/=: a substantial part of which was paid as court fees. It is apparent that the plaintiff is misguided in thinking that he can profit from the labours of his advocate.

From the foregoing, it is evident that the originating motion filed by the plaintiff is for dismissal. It is hereby dismissed. The plaintiff shall pay the costs of this originating summons to the defendant.

**DATED at NAKURU this 25<sup>th</sup> day of OCTOBER 2007**

**L. KIMARU**

**JUDGE**