



REPUBLIC OF KENYA

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

Misc Apli 95 of 2005

AKIDE & COMPANY ADVOCATES.....PLAINTIFF

VERSUS

JULIA AKELLO KUNGURU.....DEFENDANTS

RULING

This is an application which has been brought by **AKIDE & CO. ADVOCATES**, hereinafter referred to as the Advocate, against **JULIA AKELO KUNGURU**, hereinafter referred to as the Client. The application is a notice of motion dated 11th May, 2007. It is brought under the provisions of Section 51 of the Advocate Act and Order L rule 1 of the Civil Procedure Rules. It seeks to have the costs as taxed by consent on 19th April, 2007, as between Advocate/Client, be made judgment of the Court. It also seeks costs of the application. There are two grounds cited for this application. The grounds are that the costs have already been taxed by consent and certificate issued. The second is that the Respondent is yet to pay the said costs.

The Advocate has sworn an affidavit in support of the application dated 15th May, 2007. In that affidavit, the Advocate annexes a certificate of taxation marked “**KWAI**” in which the Advocate/Client Bill of Costs was taxed as agreed by consent at Kshs.195,883/=. The Advocate depones that there was no dispute to the costs as certified and that no payment had been made to settle the same.

The Application was opposed. There was a notice of preliminary objection dated 17th October, 2007, filed by **ODERO-OLONDE & CO. ADVOCATES**. It indicates that the notice has been raised on behalf of the Defendant/Applicant. That is a misdescription of the party raising objection since the Applicant was the Advocate and the only party who could raise objection to the Application could only be the client, who is the Respondent to the Application. That misdescription occasions no prejudice to any party and is therefore disregarded.

The preliminary objection raised is firstly that the application is misconceived and an abuse of the Court process and; secondly, the court lacks jurisdiction to entertain the application.

When the application came up for hearing, the Court directed that the objection be argued as part of the response by the Respondent’s Advocate.

Ms. Kotola argued this application on behalf of the Applicant. Miss. Kotola submitted that there was no dispute as to the retainer. Counsel relied on the supporting affidavit and the certificate of costs annexed therein. Counsel submitted that the certificate of costs had neither been set aside nor has it been paid.

Mr. Omande argued the preliminary objection in reply to the Application. Counsel submitted that under Rule 13(1) and (2) of the Advocates (Remuneration) Order, taxation should take place before a taxing officer. Counsel submitted that following the taxation, the costs could only be recovered by way of filing suit, under Rule 48 of the Advocate Remuneration Rules. In the circumstances, Mr. Omande submitted, the application was not proper. Ms. Kotola, in reply to Mr. Omande's submissions stated that under Section 51(2) of the Advocates Act, an order may be made that judgment be entered for the sums certified as costs. Counsel submitted that where there was a taxation which had not been set aside, judgment could be entered. Counsel relied on Section 48(3) of the Advocate Act which, counsel submitted, provides that bills of costs between Advocate and Client may be taxed notwithstanding no complaint is filed.

I have considered the submissions by counsel, the application herein, affidavit sworn in its support together with the annexures and the grounds raised in the preliminary objection filed herein.

The certificate of costs in this application was taxed by consent of both Advocate and Client before the Taxing Master. That settles two issues, one that the retainer is not in dispute and secondly the costs were also not in dispute. The Taxing Master issued a certificate of costs in the sum taxed before him by the parties. That certificate is annexed to the supporting affidavit to this application. It has not been challenged, nor set aside nor settled by the client.

The issue which has been raised by the Client's Advocate, as I understood it, is that the Advocate ought to have filed a suit to recover its costs. He relied on Rule 48 of Advocate (Remuneration) Rules which does not exist. No authorities have been cited to support this submission or contention. Section 51(2) of the Advocate Act provides:

"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."

That section provides that an Advocate has to meet the three conditions set out in that section before judgment can be entered in their favour. These conditions are:

- a) A certificate of the taxing officer by whom their bill was taxed has been issued;
- b) the said certificate of taxation has not been set aside or altered by the Court; and
- c) the retainer is not disputed.

Section 51(2) of the Advocate Act does not prescribe the

manner in which judgment for an undisputed certificate of taxation can be sought. The issue raised by the Client's Advocate is that the Advocate should have filed a suit to recover the taxed costs. Counsel relied on Section 48(1) of the Advocate Act. The Act provides:

"Subject to this Act, no suit shall be brought for the recovery 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 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 limits of the Court's jurisdiction in which event action may be commenced before expiry of the period of one month."

The Advocate chose to move the court under Order L rule 1 of the Civil Procedure Rules by filing a

Notice of Motion. The Client has not challenged the competence of the Notice of Motion and therefore no legal challenge to the manner in which the Advocate moved the court. I agree with the interpretation of Section 51(2) of Advocate Act by my brother **Njagi, J** in **MACHARIA NJERU VS COMMUNICATIONS COMMISSIONS OF KENYA HCCC NO. 1029 OF 2002 (UR)**, where the learned Judge held that the words of the said section were very clear that where a certificate of taxation had neither been set aside nor altered by the court, and where there was no order of stay, the certificate was final as to amount of costs covered thereby and to allege a dispute at the summary judgment stage would amount to a contradiction of the express and mandatory statutory provisions. In **OWINO OKEYO & CO. ADVOCATES VS MIKE MAINA & ANOTHER H.C. MISC APPLICATION NO. 651 OF 2004(UR)** my learned brother **Visram, J** observed the said 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 is clear cut situation 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”.

The instant case is a clear situation where there is no dispute since the parties taxed the Advocate/Client bill of costs by consent. The Taxing Master then issued a certificate of taxation which has not been challenged in any way. It is highly unjust to require at this stage that the Advocate should file a suit to recover his fees. Having found that the Advocate complied with the requirements of Section 51(2) of Advocate Act, I allow the Notice of Motion dated 11th May, 2007, and filed on 14th May, 2007, in terms of prayer 1 and the certificate of costs annexed thereto. The Advocate also gets costs of the application.

Dated at Nairobi this 2nd November, 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of:

Ms. Kotonya for Applicant

Ms. Kimani holding brief for Mr. Oroge

LESIIT, J.

JUDGE

Ms. Kimani: We seek stay of execution for 30 days.

Ms. Kotonya: We do not oppose it.

COURT: Stay of execution for 30 days granted.

LESIIT, J.

JUDGE