



REPUBLIC OF KENYA

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

Misc Appli 752 Of 2004

AHMEDNASIR ABDIKADIR & COMPANY

ADVOCATES..... PLAINTIFF

VERSUS

**NATIONAL BANK OF KENYA LIMITED.....
DEFENDANT**

RULING

This is an application which has been brought by M/s Ahmednasir Abdikadir and Company Advocates hereinafter called “**the advocates**” against National Bank of Kenya Limited hereinafter called “**the client**”. The application has been brought under the provisions of Section 51(2) of the Advocates Act and Order L Rule 1 of the Civil Procedure Rules. The advocates primarily seek judgment against the client in the sum of KShs.8,840,877.40 being the sum taxed and certified by the Deputy Registrar as due to the advocates together with interest thereon.

The application is supported by an affidavit sworn by one Hassan Nunow Lakicha a partner in the advocates’ firm who depones that on 6.12.2000, the advocates were instructed by the client to defend proceedings in HCCC No.2162 of 2000. On or about 21.10.2004 the advocates filed an Advocate/Bill of costs in respect of their fees in the said suit which bill was taxed in the said sum of KShs.8,840,877.40 and a certificate of taxation was issued for the said sum. The advocates have annexed copies of the said bill and the certificate of taxation as “**HNL1**” and “**HNL2**”. A copy of the ruling of the Deputy Registrar is also annexed as “**HNL3**”. Mr. Lakicha has also deponed that there is no dispute as to the retainer. In support of this averment a copy of a letter dated 6.12.2000 giving instructions to the advocates has been exhibited as “**HNL4**”. There is also a disposition that the client has not appealed against the decision of the Deputy Registrar.

The application is opposed and there is a replying affidavit sworn by one Leonard G. Kamweti the client’s Company Secretary. Mr. Kamweti admits that instructions to defend the client in HCCC No.2162 of 2000 were indeed given to the advocates as stated on 6.12.2000. However the appointment of the advocates by the client was based upon conditions contained in a letter dated 11.9.2000 from the client to the advocates. That letter is exhibited as “**LGK 3**”. There is also exhibited “**LGK5**” which is a copy of the client’s fees policy which provided that the client would only pay Advocate/client fees for contentious work at only 30% of Scale fees. Mr. Kamweti further depones that the client paid KShs.2 million to the advocates as fees in HCCC No.2162 of 2000 and it would be necessary for accounts to be taken. It is the client’s view that the issues regarding the legality and effect of the agreement between the client and the

advocates can only be ventilated and determined at a full trial and for this reason it is necessary that the advocates should file a substantive suit. There is a further deposition that the client is keen on challenging the Certificate of Costs and intends to file a reference challenging the decision of the Deputy Registrar.

The application was canvassed before me on 1.3.2006 by Mr. Ahamednasir Learned Counsel for the Advocates and Mr. Katiku, Learned Counsel for the client. The Learned Counsels substantiated the positions taken by their respective clients in their respective affidavits. Several decisions were cited to support their respective positions.

I have considered the application, the affidavits filed and the submissions of Learned Counsels. I have also carefully considered the cases cited. Having done so, I take the following view of this matter. I will first dispose of what I consider a preliminary issue before considering the merits and demerits of the advocates' application. The advocate/client bill of costs according to the record was taxed by M. Kaikai (D.R.) and not J. M. Were (D.R.) as stated at paragraph 4 of Mr. Lakicha's affidavit aforesaid. Indeed the ruling exhibited by Mr. Lakicha as HNL3 puts this point beyond controversy. The Certificate of Taxation however was signed by Deputy Registrar J. M. Were. In my view however the discrepancy in paragraph 4 of Mr. Lakicha's affidavit is not fatal to the advocates application as there is no dispute that indeed a Certificate of Taxation was issued for the sum taxed of KShs.8,840,877.40. The misdescription could not and did not in fact occasion any prejudice to the client.

Turning now to the merits of the application, it is the advocate's case that under Section 51(2) of the Advocates Act, they are entitled to judgment for the said sum of KShs.8,840,877.40 which is the sum that was certified to be due to them by the Deputy Registrar as their costs against the client in HCCC No.2162 of 2000. Under the said Section of the Advocates Act, the advocates' argument is that they have established the conditions set out there under to wit:-

- (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;
- (c) The retainer is not disputed.

With respect to the submission made on behalf of the client that an agreement existed between the advocates and the client regarding fees payable the advocates contention is that that argument is not relevant now and should have been made before the Deputy Registrar at the time of taxation or in other proceedings for setting aside or altering the said taxation. The alleged agreement was in any event not applicable to the instructions that formed the basis of the taxation at hand.

The gist of the client's opposition to this application is that as the legality and effect of the said agreement are weighty issues, the orders sought by the advocates should not be granted as the same can only be properly ventilated and determined at a full trial and for that reason the advocates should institute a substantive suit. It is also the client's case that it is keen on challenging the Certificate of Costs and intends to file a reference to the High Court accordingly.

Section 51(2) of the Advocates Act 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 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”.

A plain reading of the above provision seems to support the position taken by the advocates in the matter at hand. There is no dispute that J. M. Were Deputy Registrar, issued a Certificate of Taxation on 15.10.2005 certifying that on 25.8.2005 the advocate/client bill of costs was taxed in the sum of KShs.8,840,877.40 and allowed in the said sum. There is further no dispute that the said certificate has

not been set aside or altered by the court. The retainer is not disputed; indeed it is expressly admitted by the client. All the prerequisites having been met by the advocates, the result is that the Deputy Registrar's Certificate of Taxation is final as to the amount of the costs covered thereby.

In my view the only grey area is how the advocates were to move the court. They have chosen to move the court by way of Notice of Motion under the provisions of Order L Rule 1 of the Civil Procedure Rules. The client has not challenged the competence of the Notice of Motion. Its only concern is that if the advocates had filed suit it would have ventilated its complaints with oral and documentary evidence. There is otherwise no legal challenge to the manner in which the advocates have moved the court. As I have stated above, Section 51(2) of the Advocates Act does not prescribe the manner of seeking judgment on an undisputed certificate of taxation.

Speaking for myself, I would recommend the wider Originating Notice of Motion for applications under Section 51(2) of the Advocates Act. The procedure would envisage the determination of issues in dispute by viva voce evidence. Having said that it is my view that as no procedure is prescribed under section 51(2) of the Advocates Act, the advocates were still entitled to move the court by way of Notice of Motion.

The client's complaints in my view are not an answer to the advocates' application which clearly meets the requirements of Section 51(2) of the Advocates Act. The complaints should have been made before the Deputy Registrar at the time the advocate/client's bill of costs was taxed. The client did not breathe a word of the present complaints at all. The client had another option. If it believed that no fees were due to the advocates on the basis of an agreement between it and the advocates, it could have filed a suit for a declaration to that effect even before the said bill was taxed. It could have sought stay orders in the suit. The client had yet another option. It could have filed a reference to the High Court and sought stay of further proceedings including these proceedings. None of the above options were taken by the client. It participated fully in the taxation without raising the issues now being raised. In my view the client goofed. I would agree with Honourable L. Njagi J's interpretation of Section 51(2) of the Advocates Act in *Macharia Njeru Advocate – vs – Communications Commission of Kenya: HCCC No.1029 of 2002 (UR)* and *Nyakundi and Company Advocates – vs – Kenyatta National Hospital Board: HCCC No.416 of 2004 (UR)*. The Learned Judge held that the worlds 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 summary judgment stage would amount to a contradiction of express and mandatory statutory provisions.

The client has placed reliance upon the decision of my brother *Waweru J in Meenyee and Kirima Advocates –vs- Kenya Commercial Bank: HC.MISC.APPL.NO.511 of 2004 (UR)* in which my Learned brother refused to enter judgment for the advocates on the basis that the client had raised issues that required to be investigated and ventilated in a proper trial. In that case the client had raised issues regarding accounts as between it and the advocates. The advocates had admitted retaining money belonging to the client. In my view this latter issue where the advocates had admitted retaining money belonging to the client no doubt tilted the balance in favour of the client. The circumstances that my brother was dealing with are distinguishable from the facts placed before me in this application where there is no admission by the advocates that they have retained any monies belonging to the client. Indeed the client makes no such allegation.

In my view Section 51(2) of the Advocates Act provides a summary method of obtaining judgment for an advocate who satisfies the conditions set therein. As my Learned brother A Visram J observed in *Omino Okeyo & Co. Advocates –vs- Mike Maina & Another: HC. MISC. APPL. No.651 of 2004 (UR)* 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 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.”***

Having found that the advocates have complied with the requirements of Section 51(2) of the Advocates

Act, I allow the advocates Notice of Motion dated 9.2.2006 and filed on 10.2.2006 in terms of prayers 1 and 3 thereof. In the light of alleged payments made by the client to the advocates towards their fees, prayer 2 of the said motion is granted subject to the advocates making the usual formal application for execution in which credit will be given for sums received by them if any.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH, 2006.

F. AZANGALALA

JUDGE

Read in the presence of:-