



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

Misc. Appli. 444 of 2004

**KALONZO MUSYOKA and PAUL M. WAMBUA (practicing as
MUSYOKA & WAMBUA, ADVOCATES).....
.....PLAINTIFF**

VERSUS

**RUSTAM HIRA (practicing as RUSTAM HIRA, ADVOCATE)
.....DEFENDANT**

R U L I N G

This is an application by an Advocate under section 51(2) of the Advocates Act, Cap.16 for judgment for his taxed costs upon the grounds that there is no dispute as to retainer and that the certificate of taxation has not been altered or set aside. Section 3A of the Civil Procedure Act is also quoted. The Client opposes the application upon the grounds (grounds of opposition dated 230th November, 2005):-

- 1. that there is no jurisdiction under section 51(2) of the Advocates Act or under section 3A of the Civil Procedure Act to grant the orders sought;**
- 2. that recovery of costs of an advocate that are taxed can only be by way of suit under section 49 of the Advocates Act;**
- 3. that mandatory provisions of section 48 of the Advocates Act had not been complied with;**
- 4. that it is in the interests of justice to allow parties to fully adjust claims against each other before any judgment is entered against the client, and that the client has already taken steps to challenge the costs taxed against it herein; and**
- 5. that the application amounts to an abuse of the process of the court because,**
 - (a) it attempts to enforce an award under the wrong provisions of the law where the award is challenged, and**
 - (b) it attempts to attain judgment for costs other than through the lawful procedure for recovery of such costs.**

There is no replying affidavit filed by the Client.

Sub-section (2) of section 51 of the Advocates Act gives the court the discretion to make such order in relation to a certificate of taxation that has not been set aside or altered as the court 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. Learned counsel for the Client, MISS KIRIMI, submitted as follows. Section 48 of the Advocates Act is in mandatory terms. Under that section there must be a suit for recovery of an advocate's costs even where there is no dispute as to retainer and the certificate of costs has not been set aside or altered. For this proposition she relied on two cases. The first one was the Court of Appeal decision of SHARMA vs UHURU HIGH DEVELOPMENT LTD (2001) 2 EA 530. The second one was the case of ORUKO AND ASSOCIATES vs BROLLO KENYA LIMITED, High Court of Kenya at Nairobi (Milimani), Misc. Appl. No. 1465 of 2002 (unreported). Miss Kirimi further argued that the certificate of taxation is final and conclusive evidence only of the quantum of costs awarded, and the procedure for recovery of those costs is different, and a suit is necessary. Judgment is not automatic under section 51 (2) simply because there is no dispute as to retainer. In any event, a decree must be hinged upon a suit. Section 51(2) would be useful to a party seeking summary judgment in a proper suit where there is no dispute as to retainer, Miss Kirimi concluded.

Mr. Simiyu, learned counsel for the Advocate, sought to distinguish the two cases. It was his view that in the **Oruko** case there was a dispute as to retainer while in the **Sharma** case the Court of Appeal was not dealing with the issue whether or not judgment could be entered for taxed costs under section 51(2) without a suit. In his turn he sought to rely on the case of HEZEKIAH OGAO ABUYA (t/a ABUYA & COMPANY ADVOCATES) vs KUGURU FOOD COMPLEX LIMITED, High Court of Kenya at Nairobi (Milimani), Misc. Appl. No. 400 of 2001 with regard to the meaning of the term "retainer" as used in section 51(2).

I have considered the submissions of the learned counsels appearing. In my view, the meaning of the term "retainer" as used in section 51(2) is as held by Ringera, J. (as he then was) in the **Abuya** case. The learned judge held, after considering the definitions of the term as found in BLACKS LAW DICTIONARY, 6th Edition, STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES, 1986, VOL. 4, WORDS AND PHRASES LEGALLY DEFINED, 2nd Edition, Vol. 4 and the OXFORD ADVANCED LEARNER'S DICTIONARY OF CURRENT ENGLISH, that the term "retainer" as used in section 51(2) is synonymous with "employment", "engagement" or "instruction". He further stated:-

"An advocate duly instructed is retained and where there is no dispute that an advocate was duly instructed by the client in any matter the retainer cannot be said to be in dispute".

I respectfully agree. I do not subscribe to the view, with respect, that the term "retainer" as used in section 51 (2) means a written agreement as to the advocate's fees, as held in the **Oruko** case quoted above. It is also apparent that the **Sharma** case did not deal with the specific issue whether or not judgment can be entered under section 51(2) without a suit.

Is suit necessary for recovery of duly taxed costs in all cases, even where there is no dispute as to retainer and the certificate of taxation has not been set aside or altered? Section 48 of the Advocates Act provides as follows:-

"48. (1) 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 in 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.

(2). Subject to sub-section (1) a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction.

(3). Notwithstanding any other provisions of this Act, a bill of costs between an advocate and a client

may be taxed notwithstanding that no suit for recovery of suit has been filed.”

In my view, sub-section (1) of section 48 above does not state that an advocate's costs must in all cases be recovered by way of plaint. Far from it. The section simply lays down a condition precedent for the filing suit for recovery of costs. That condition is delivery or sending by registered post to the client a duly signed bill of costs, which may be in summarized form, at least one month before filing action. Section 49 of the Act lays out the procedure in an action where the quantum of costs is challenged by defence. It is to be noted that such procedure may include taxation before the suit is set down for hearing.

Section 51 of the Act makes general provisions as to taxation, as the marginal note indicates. One of those provisions is that the court has the discretion to enter judgment upon a certificate of taxation which has not been set aside or altered where there is no dispute as to retainer. This, in my view, is a mode of recovery of taxed costs provided by the law, in addition to the filing of suit, where such suit would be unnecessary because, one, the certificate of taxation has not been set aside or altered and, two, there is no dispute as to retainer. Unless there is any other matter as would require ventilation in a trial, what would be the necessity of filing suit? In my view the court would be entitled to enter judgment under section 51(2) even where there is no suit filed. I so hold.

In the present case there is no allegation that the Advocate had no instructions to act in the matter for the Client. Indeed the taxation was largely by consent except for the instruction fee. So, there is not, and there cannot be, a dispute as to retainer. As it stands now the certificate of taxation has not been set aside or altered. It has been submitted that the client has taken steps to challenge the award on instruction fee. If that be the case, what the Client should have done was to seek a stay of further proceedings until the challenge to the taxation is disposed off. There is no such application before the court. In the circumstances I find no reason to deny the Advocate judgment as sought.

For the above reasons I will allow the application and enter judgment for the Advocate in the sum of KShs.1,114,732/00 plus interest at 9% per annum from the date of taxation until payment in full. The Advocate shall also have the costs of the application. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF MARCH, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 17TH DAY OF MARCH, 2006.