



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

Misc Appli 156 of 2003

OWINO OKEYO & COMPANY ADVOCATES.....
APPLICANT

VERSUS

PELICAN ENGINEERING & CONSTRUCTION CO. LTD.....
RESPONDENT

R U L I N G

The application before me has been brought under the provisions of Section 51(2) of the Advocates Act and is by a firm of Advocates. It seeks one primary order that judgment be entered for the Advocates/applicants against the respondent for the sum of KShs.309,895.00. Interest at 9% p.a. from 2.9.2001 is also sought. The primary reasons for the application are that the Advocates bill of costs was on 28.3.2003 taxed by the Deputy Registrar in the said sum of KShs.309,895.00 in favour of the advocates; that The Deputy Registrar issued a Certificate of Taxation on 29.4.2003 and the same has not been altered, varied or set aside.

The application is supported by an affidavit of Stephen Omondi Owino Advocate sworn on 10.4.2006. Annexed to the affidavit is the said Certificate of Taxation. The Advocate depones that no appeal or application to alter vary or set aside the said taxation has been made by the respondent or any other party. In the premises, the advocates contend that they are entitled to judgment under Section 51(2) of the Advocates Act and need not file suit for the same. In his oral submission in court, counsel for the advocates stated that there is no dispute as to the retainer and the application should be allowed as prayed. Reliance was placed upon the case of **Oruko & Associates –vs- Brollo Kenya Limited: Nairobi Misc. Appl. No.1465 of 2002 (UR)** which is a decision of my Learned Brother Nyamu J. The Learned Judge was of the view that judgment under Section 51(2) can only be entered where there is proof of a retainer and the retainer is not disputed.

With respect to what a retainer is, counsel relied upon the decision of Ringera J as he then was in **Hezekiah Ogao Abunya – vs – Kuguru Food Complex Ltd: Nairobi HC. Misc. Appl. No.400 of 2001 (UR)**.

In that case the Learned Judge delivered himself as follows at page 7 of his ruling:-

“I am persuaded that the word retainer as used in Section 51(2) of the Advocates Act is synonymous with “employment”, “engagement” or “instruction”. 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.”

Further reliance was placed upon the case of **A. N. Ndambiri & Co. Advocates –vs – Mwea Rice Growers Multi-purpose Cooperative Ltd: Nairobi HC.MISC. Appl. No.698 of 2004.** That was a decision of my Learned Brother Waweru J. The Learned Judge observed as follows at page 3 of his Ruling:-

“My understanding of the term “retainer” as used in Section 51(2) aforesaid is instructions to act in the matter in which the costs have been taxed.”

The respondent has opposed the application. In its Grounds of Opposition two reasons are given for objecting to the application. The 1st one is that there is a dispute as to the retainer and the second one is that the sum payable on the certificate is the subject matter of an application for accounts pending before court in **Nairobi HCCC No.1574 of 2001 (OS): Mike Maina & 5 others – vs – Omino Okeyo and Company Advocates.** The respondent has also filed a replying affidavit sworn by one Mike Maina a director of the respondent. Of particular note is paragraph 4 in which it is deponed that the respondent does not dispute the taxed costs of KShs.309,895.00 awarded. The reason for opposing the application is given in paragraphs 5 and 6 of the affidavit. It is deponed in the two paragraphs that the taxed costs of KShs.309,895.00 have already been paid and that the respondent has in HC. MISC. No.1574 of 2001 (OS) above sought orders of accounts and the taxed costs may be set off when accounts are taken. In the respondent’s view therefore, there is a dispute as to the retainer. That being the position judgment cannot be entered for the advocates as prayed. Reliance was placed upon the case of **Oruko & Associates – vs – Brollio Kenya Limited (Supra).** In that case the retainer was not exhibited and the Learned Judge held that in the event an action for recovery was necessary under Section 48 of the Advocates act. In the premises counsel for the respondent urged me to dismiss the application.

I have now considered the application the rival submissions made to me by counsel and the authorities cited. Having done so, I take the following view of the matter. Section 51(2) of the Advocates Act reads as follows:

“51(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 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 the costs.”

That section in my understanding, gives the court the jurisdiction to enter judgment for taxed costs where two conditions are satisfied.

The first condition is that there must be a certificate of the taxing officer by whom the bill has been taxed which certificate has not been set aside or varied by the court. Secondly there must be no dispute as to the retainer. If those two conditions are satisfied, the court has a discretion to enter judgment for the sum certified to be due with costs.

In the case at hand, it is common ground that the first condition has been met by the advocates. What is in contention is whether or not there is a dispute as to the retainer. I agree with my learned brothers Ringera J as he then was and Waweru J with their definitions of what a retainer is. As cited above, Ringera J took the word to mean “**employment**” “**engagement**” or “**instruction**” in **Hezekiah Ogao Abunya –vs – Kuguru Food Complex Ltd (Supra).** Waweru J on his part in **A.N. Ndambiri & Company Advocates – vs – Mwea Rice Growers Multi-purpose cooperative Limited (Supra)** defined retainer as used in Section 51(2) of the Advocates Act as “**instructions to act in the matter in which the costs have been taxed.**”

Turning back to the matter at hand, the respondent in the replying affidavit of Mike Maina aforesaid, does not dispute the taxed costs of KShs.309,895.00. The respondent’s contention is that the costs have already been settled. Those depositions in my view are clear admissions that the respondent instructed the advocates. In other words the respondent retained the advocates. That being the position, in my view there is no dispute as to the retainer. The respondent has not challenged the taxation under Rule 11 of the Advocates Remuneration Order. The Certificate of Taxation has accordingly not been set aside or altered

by the court. Under Section 51(2) of the Advocates Act that Certificate of Taxation is final as to the amount of costs thereby.

In the premises, I am of the view that the conditions set under Section 51(2) of the Advocates Act have been satisfied. The existence of Nairobi HCCC No.1574 of 2001 (OS) would not disentitle the advocates to judgment. That case was filed in the year 2001. The Certificate of Taxation in this case was issued on 29.4.2003 pursuant to a Bill of Costs dated 28.3.2003. The issues now raised by the respondent ought to have been raised at the taxation or in a reference to a Judge against the Taxation. Alternatively the respondent should have instituted proceedings to stay the taxation or this application.

As stated above, I find no reason to deny the advocates judgment as sought. Accordingly Judgment is hereby entered against the respondent for the sum of KShs.309,895.00. With regard to interest, taking the relationship of the parties hereto I award interest to the advocates at the rate of 9% p.a. from 29.4.2003. The Advocates shall have the costs of this application.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 21ST day of SEPTEMBER, 2006.

F. AZANGALALA

JUDGE

21/9/2006

Read in the presence of:-