



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT 180 OF 2004

EDWARD MAIN NJANGA t/a

MAINA NJANGA & CO. ADVOCATES PLAINTIFF

Versus

NATIONAL BANK OF KENYA LTD. DEFENDANT

**Coram: Before Hon. Justice Mwera
Maina for Applicant
K. Shah for Respondent
Court clerk –Kazung**

RULING

The plaintiff firm of advocates sought summary judgement in this cause pursuant to O.35 rr. 1 (1) (2), 5, 8 Civil Procedure Rules and SS. 3A, 27 Civil Procedure Act plus paragraph 7 of the Advocates Remuneration Order. The notice of motion dated 26-8-04 had that prayer predicated on the grounds that the claim is liquidated and it should be paid with interest summarily. That the defence is a disguised form of appeal or reference from the decision of a taxing master. That that purported defence is thus a sham intended only to delay the inevitable judgment and in any case there was no stay order against the plaintiff's action to recover the costs. Mr. Maina, the proprietor of the plaintiff firm swore an affidavit in support of the application which he argued with the aid of annexures/exhibits and authorities. References were also made to the principal pleadings.

Mr. K. Shah for the defendant bank relied on the replying affidavit to stoutly oppose this application. Both arguments, over two sittings, were long and learned and this court will do no more to them than to endeavour to weave them into the following determination.

There is no dispute regarding the retainer between the two litigants herein. The plaintiff rendered legal services to the defendant and then sought to be paid fees. Seemingly these were not paid straight away and Misc. Application Nos. 583, 584 both of 2003 were filed to tax costs. Taxation proceeded and two certificates of costs (of Shs.10,457,880/- and Shs.6442,077/-) issued. Again it looks like the defendant did not honour them and so the plaintiff was obliged to sue its client to recover the costs. The costs in the two certificates totaled Sh.16,970,157/- but at the time of suing on 14-7-04 the sum claimed stood at Sh.10,421,548/-, having given credit of the sum that the bank had paid but including an element of interest. Up to this point this court is of the considered mind that the plaintiff followed the course provided for in the law when such disputes arise between a firm of lawyers and his/her client.

A month after the suit was filed the plaintiff filed this application on the basis that the defendant did not have a genuine defence to its demand. That the sum pleaded was liquidated i.e. certain. That is was truly owed and so it ought to be paid at this point rather than going through the rigours of a trial. The defendant thinks otherwise. Mr. Shah in the main, argued that the defendant had or intended to file a reference under paragraph 11 of the Advocates Remuneration Order and so the plaintiff should hold on with its move by way of summary judgment.

After hearing both sides, the points on which this court can disallow an application for summary judgement include the defendant demonstrating that it has a triable issue or issues which it must be allowed leave to defend at the trial of the suit.

First and foremost it needs be noted from Mr. Shah's submission here that he did not touch on this aspect or if he did so it was not quite clear as to which point(s) stood out to go to trial. He argued at length that his client was waiting for the written reasons from the taxing master (in Misc. Application No. 583/03) in order to file a reference to challenge (some or all of) the taxed items. That the plaintiff will not suffer prejudice if it awaits the outcome of that reference while the defendant would suffer if at this stage the plaintiff got orders for a larger decree than it is entitled to. That the only liquidated sum of costs can come at the end of the reference either in the High Court or the Court of Appeal, otherwise the certificates of costs are only prima facie in showing what the plaintiff advocate may be entitled to but they are not final and conclusive. Essentially what is said immediately hereinbefore encompasses what Mr. Shah told the court and the contents of the replying affidavit from his client. Neither made to demonstrate that the defendant has triable issue(s) that should disentitle the plaintiff from obtaining summary judgement. Perhaps this can be gleaned from the defence.

The defence filed here on 10-8-04 denied that the defendant owed the plaintiff any money and put it to strict proof. It averred that the plaintiff was moving in breach of an agreement (probably for services) and thus acting in a manner prejudicial to the defendant. On this, the court however was told that the said agreement was found by Maraga J to be null and void, even if the defence stated that ruling was subject to an appeal. It was further pleaded that the taxing master's decision (on costs) was subject to reference because she awarded enormous instruction fees in simple and uncomplicated matters. There was a threat in the defence that the defendant reserved the right to counterclaim for refund of overpaid sums. Such a counterclaim was not part of this defence and so again this court was denied benefit of whatever may have constituted a triable issue or issues if any.

Having considered this defence vis a vis the plaint (above), on its own this court is unable to discern triable issues or even one that may entitle the defendant to leave to defend. Denying any sum claimed is a standard pleading putting the plaintiff to strict proof but adding no substance to the whole case. For the sake of this application the plaintiff displayed two certificates of costs for the sums sought in the plaint. The sums are certain, liquidated and can be litigated in the manner the plaintiff has moved. Far from Mr. Shah's stand about certificates of costs only being prima facie evidence of what a claimant can seek, the law is certain and clear about such certificates. S. 51 (2) of the Advocates Act (Cap 16) says:

“51. (1) ----- (2) The certificate of a 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 costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in the case where the retainer is not disputed, an order that judgement be entered in the sum certified to be due costs.”

No more need be said to add to this clear and mandatory provision of law. Indeed it has been amply commented upon by various authorities including the following to which this court wishes to add nothing lest it dilute the substance and essence brought out in each case: **MACHARIA NJERU ADVOCATE VS. COMMUNICATION COMMISSION OF KENYA NRI (MIL) HCCC 1029/2002 ; NYAKUNDI & CO. ADVOCATES VS. KENYATTA NATIONAL HOSPITAL BOARD NRI (MIL) HCCC 416/04, and NDAIGA & CO. ADVOCATES VS. KENYA TEA DEVELOPMENT AGENCY LTD NRI HCCC 223/02.**

This court has already said that there was no dispute over the retainer. There is no stay order of these

proceeding in favour of any party or other. In fact there could be none at all. As to the intended references against the taxing officer's decisions they cannot be a bar to proceedings as these. The defendant seems to say so in its defence in a way this court thinks is misconceived. To attack taxation order does not lie in a defence to a suit. It has its procedure. It cannot in terms of S. 51(2) (above), be said that until this court or the Court of Appeal has determined a reference/appeal about taxation does, it become final and conclusive. It is conclusive enough if the taxing officer's certificate is neither set aside nor varied. And that is the case here. In the form these two certificates stand as exhibited here they warrant a judgement to be entered in the sum certified to be the costs. If that is not done, this court will be taking a path away from the law. It cannot do so. To deny the plaintiff firm judgement in the circumstances would also be a prejudice to it. It has not done anything of fault either by the process or the law. It cannot be denied its fruits for work done or the litigation forced on it.

So all in all the prayers sought in the notice of motion are granted with costs.

Delivered on 17th June 2005.

J.W. MWERA

JUDGE