

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 698 OF 2004

A. N. NDAMBIRI & CO. ADVOCATES.....PLAINTIFF

VERSUS

MWEA RICE GROWERS MULTIPURPOSE CO-OPERATIVE LTD....DEFENDANTS

R U L I N G

This is an application (notice of motion dated 23.2.2005) by an advocate for judgment for his taxed costs of Kshs.1,365,790/00 and for liberty to execute the resulting decree against the client. It is brought under Section 51(2) of the Advocates Act, Cap. 16. That subsection donates to the court the power to make such order in relation to a certificate of the taxing officer as it thinks fit, including, in the case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.

I have read the supporting affidavit sworn by the advocate, ALFRED NJERU NDAMBIRI, on 23rd February, 2005. To it is annexed a certificate of taxation dated 7th January, 2005, duly signed by the taxing officer, for the sum of Kshs.1,365,790/00.

The client has opposed the application upon the grounds set out in the grounds of opposition dated 15th March, 2005. One of those grounds is that under the relevant law the advocate must file a substantive suit where all issues in dispute can be canvassed. Another ground is that the application is misconceived and based upon a wrong interpretation of the ruling of the taxing officer dated 1st November, 2004. There is no replying affidavit filed.

I have considered the submissions of the learned counsels appearing. I also have the ruling of the taxing officer before me. She stated as follows when considering the instruction fee:-

“.....taking all the circumstances into consideration, I find that the sum of Kshs.9,000,000/= sought is too exorbitant. The advocate has already received other fees (Kshs.1.5 m).

“The sum of Kshs.9,000/00 will therefore suffice on item 1(a).....”.

The costs as taxed therefore were what the taxing officer found to be due and payable to the advocate after taking into account what he had already been paid. The submission of the learned counsel for the client that the taxed amount had already been paid, nay, overpaid, is not borne out by the ruling of the taxing officer and is not correct. It was not urged before the taxing officer that the advocate had no instructions to act in the matter for the client and that therefore he was not entitled to any costs. None of the grounds of opposition claim so; indeed ground 3 is a confirmation that the advocate had instructions to act in the matter. As already noted, there is no replying affidavit deponing to a contrary position. 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. I do not, with respect, subscribe to the view that “retainer” means an agreement in writing as to the fees to be paid. Needless to say, where there is such agreement taxation would hardly be necessary. In the circumstances I find that there is no dispute as to the retainer.

The certificate of costs has not been altered or set aside. I find no reason to deny the advocate judgment as sought. I will therefore grant the application as prayed with costs to the advocate. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF JUNE, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 10TH DAY OF JUNE, 2005.