



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI**

**CIVIL APPEAL 520 OF 1999**

**DR. KANYENJE GAKOMBE ..... APPELLANT  
VERSUS  
MURIITHI WANJAU ..... RESPONDENT**

**(An Appeal from the Judgment of Hon. J. R. Karanja, SPM in**

**Nairobi Milimani Commercial Courts Civil Suit No. 8373 of 1995  
delivered on 29th October, 1999).**

**J U D G M E N T**

By a Plaintiff dated the 3rd April, 1995, and filed in the lower court on 8th August, 1995, the Respondent (Plaintiff in the lower court) claimed the sum of Kshs.58,000/= from the Appellant in respect of legal services allegedly rendered to the Appellant. The Appellant denied that such services were rendered, but called no evidence to support his denial. However, it is not in dispute that the Respondent neither issued a bill for costs, nor had his fees taxed by the Registrar. He simply filed a suit for the recovery of the sum, upon the Appellant's refusal to pay.

The lower court, having heard evidence from the Respondent, was satisfied, on a balance of probability, that legal services had indeed been rendered to the Appellant, and awarded the sum claimed to the Respondent. Aggrieved by that decision, the Appellant has appealed to this court, outlining the following four grounds of appeal:

- “1. The learned Magistrate erred in law in finding that the Respondent was entitled to Kshs.58,000/= arising from a fee-note raised while the said material fact was not pleaded in the plaint.***
- 2. The learned Magistrate erred in law in finding that the Respondent was entitled to Kshs.58,000/= as professional fees arising from a fee-note raised whereas the said fee-note was not produced as evidence.***
- 3. The learned Magistrate erred in law in finding that the Respondent had proved his case whereas the Respondent's case did not plead material facts nor adduce evidence to found a cause of action under Section 48 (1), Advocates Act.***
- 4. The learned Magistrate erred in law in entering judgment for the Respondent whereas the Respondent had not exhausted his burden of proof.”***

Section 48 (1) of the Advocates Act (Cap 16) states:

***“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.”***

As I indicated before, no such bill for costs was issued, or pleaded by the Respondent. Accordingly, on that ground alone, his suit in the lower court should have been struck out, as being incompetent.

In any event, Section 49 of the Advocates Act prescribes the course that should have governed the suit in the lower court where the Defendant had disputed the payment of the legal fees as claimed. That Section stipulates as follows:

***“49. Where, in the absence of an agreement for remuneration made by virtue of section 45, a suit has been brought by an advocate for the recovery of any costs and a defence is filed disputing the reasonableness or quantum thereof-***

- (a) no judgment shall be entered for the plaintiff, except by consent, until the costs have been taxed and certified by the taxing officer;***
- (b) unless the bill of costs on which the suit is based is fully itemized, the plaintiff shall file a fully itemized bill of the costs within fourteen days from the date of service of the defence, or such further period as may be allowed by the court, and shall serve a copy thereof on the defendant, and, if the total amount of such bill exceeds the amount sued for, the prayer of the plaintiff shall, subject to the court’s pecuniary jurisdiction, be deemed to be increased accordingly and all consequential amendments to the pleadings may be made.”***

No such procedure, as outlined in Section 49 (a) above, was followed. Accordingly, this court concurs fully with the submissions made by Mr Mari, Counsel for the Appellant, and hereby allows this Appeal with costs. The Judgment and the decree of the lower court is set aside, and the Respondent’s suit in the lower court is dismissed with costs to the Appellant.

Dated and delivered at Nairobi this 20th day of July, 2005.

**ALNASHIR VISRAM  
JUDGE**