



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 241 OF 2017

(FORMERLY NRB ELC 92 OF 2010)

JOHN NJUGUNA KIMUNYA.....PLAINTIFF/APPLICANT

VERSUS

TERESIAH WACHUKA KIMUNYA.....1ST DEFENDANT/RESPONDENT

GEOFFREY SITUMA WANYONYI.....2ND DEFENDANT/RESPONDENT

RULING

By a Notice of Motion Application dated 13th June 2020 the Plaintiff/ Applicant sought for orders that;

1. That Judgment be entered for the Plaintiff against the Defendants jointly and severally as certified in the Certificate of taxation dated 3rd December 2019, and a Decree be issued thereon.

2. That costs of this Application be borne by the Defendants

The Application is premised on the grounds that the court entered Judgment against the Defendants jointly and severally with costs to the Plaintiff / Applicant vide Judgment delivered on 19th June 2018. That by a Party and Party Bill of costs dated 7th February 2019, the Plaintiff/ Applicant sought taxation of the said bill of costs in the sum of

Kshs.2,646, 621.00. That the said bill of costs was not Defended and the Court taxed the same at **Kshs. 387,363.00** vide a Certificate of taxation dated 3rd December 2019. Further that the said Certificate of taxation has been served on the Defendants through their Advocates on records and the Defendants/ Respondents have failed / refused and or neglected to settle the same. That it is only just and fair that Judgment be entered in terms of the Certificate of costs issued by the Court and a Decree be issued thereon.

In his Supporting Affidavit, **James Gathu Njuguna** averred that his Advocates on record served the Certificate of taxation on the Advocates for the Defendants/ Respondents and the Defendants/ Respondents Advocates sought to have the 2nd Defendant/ Respondent settle half of the costs which proposal was not acceptable to them. That he would wish to execute the taxed costs against the Defendants/ Respondents hence the Application. That the Defendants / Respondents do not have a Defence to the Application.

The Application is opposed and the 2nd Defendant/ Respondent filed a Replying Affidavit sworn on 25th August 2020 and averred that when he learnt of the Certificate of Taxation, he went to search for the 1st Defendant/ Respondent who is the Plaintiff's/ Applicant's grandmother who is old and sick and informed her of the outcome of the said taxation. That the 1st Defendant/ Respondent informed him that there was no one to take care of her as she was sick and could not afford to pay the Advocates costs and advised him to pay half of the share of the taxed amount. That he instructed his Advocates that he was willing to pay half of the taxed amount and requested the Advocate to communicate to the Plaintiff/ Applicant's Advocate where he provided his proposal of paying the said taxed amount. That the Plaintiff/ Applicant never responded to their proposal and he assumed that they had accepted the proposal. That before the date he had promised was due for him to make his 1st Instalments, on 13th March 2020 in which he wrote a cheque directly to the Plaintiff's/Applicant's Advocate for **Kshs. 65,000/=** and the same was received on 17th March 2020, by the Plaintiffs / Applicant's Advocate.

That on the same day on 17th March 2020, his Advocate on record was served with the Plaintiffs/ Applicant letter declining the said payment and returned the cheque claiming they had been paid half of the claimed amount taxed and that the other half to be paid with two installments. He averred that since they were two parties as Respondents, each party is at liberty to commit as its obligations and cannot be

forced to enjoin the other to meet the others obligations. That the Plaintiff/ Applicant is aware of the 1st Defendant's/Respondents status as she cannot afford her food. He further averred that he was willing and ready to pay the said half amount taxed on the Certificate of the taxation issued by the Court on **3rd December 2019** , and had the Plaintiff/ Applicant not declined his offer he would have already concluded paying the said half amount taxed by **August 2020**. That the Application is therefore a waste of the Court's time. He urged the Court to dismiss the Application.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The issue for determination is **whether the Plaintiff/ Applicant is entitled to the orders sought**.

The Plaintiff/ Applicant has sought for orders that a Judgment be entered in terms of the Certificate of Taxation dated **3rd December 2019**. It is not in doubt that Judgment in this matter was entered on **19th June 2018**, thereafter the Plaintiffs/ Applicants Advocate filed their bill of costs. The Defendants/ Respondents did not participate in the said hearing nor did they defend the bill of costs. Thereafter the Deputy registrar taxed the bill of costs at **Kshs. 387,363.00** and the Plaintiff/ Applicant served the same upon the Defendants/ Respondents. While it is the 2nd Defendant's /Respondent's submitted that he has always been willing to pay his share of the Costs, he has not contested the said Certificate of Costs. What the 2nd Defendant/ Respondent is contesting is the entering of the said Judgment.

Section 51(2) of the Advocates Act provides that;

“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 covered 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 due with costs.”

In the instant case the Certificate of Costs dated **3rd December 2018**, is not disputed. From the above provision of law, it is thus clear that the same is final. The Section further gives the Court the power to make an order of Judgment as per the Certificate of Costs. It is clear that the Judgment that would be entered would be as per the Certificate of costs and no alterations or amendments can be made. Though the 2nd Defendant/ Respondent is contesting the entering of the Judgment, he has not contested the Certificate of cost and therefore the Court finds no reason as to why Judgment as per the Certificate of Costs should not be entered.

It is important to note that the Court in entering the Judgment as per the Certificate of costs is not apportioning any amounts to any parties. This also does not bar the 2nd Defendant/Respondent from making payment in fulfilment of the said Certificate of costs. The Court therefore finds and holds that the Certificate of costs having not been contested and the fact that the same is final, there is no reason not to enter Judgment as per the Certificate of Costs dated **3rd December 2018**. See the case of **Ndungu Githuka and Company Advocates ...Vs... Geoffrey Moriaso Ole Mailoy [2019] eKLR** where the Court held that;-

“As I have already explained herein above, the advocate /client bill of costs was taxed in December 2018 and a certificate of costs issued. That certificate was not challenged and has not been set aside or altered. The respondent was served with the present application but did not respond to it. he also failed to attend court during the hearing despite being served which leaves the application unopposed.

22. That being the case, and there being no challenge to the certificate of costs, this court has no option but to allow the application. Consequently, the application dated 28th May 2019 is allowed as follows.....;”

The Upshot of the foregoing is that the Court finds the Notice of Motion Application dated **13th June 2020**, is merited in so far as the order for Judgment is concerned. On Costs the Court is empowered under **Section 27 of the Civil Procedure Act** to use its discretion. Though costs always follows the event , the circumstances of this case in that the 2nd Defendant/ Respondent was willing to pay the costs and had even sent out a cheque warrants the court to exercise its discretion and order that each party to bear its own costs.

Consequently, the Court finds the Notice of Motion Application dated **13th June 2020** is **merited** and the same is allowed with each party bearing its own cost of this Application.

It is so ordered

DATED, SIGNED AND DELIVERED AT THIKA THIS 18TH DAY OF MARCH, 2021

L. GACHERU

JUDGE

18/3/2021

Lucy - Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Kariuki for the Plaintiff/Applicant

No appearance for the Respondent

L. GACHERU

JUDGE

18/3/2021