



CM Advocates LLP v Cole (Suing as the administrator of the Estate of Josephine Eleanor Moikobu) (Environment and Land Miscellaneous Application E170 of 2021) [2023] KEELC 20475 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20475 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E170 OF 2021
JO MBOYA, J
OCTOBER 5, 2023

BETWEEN

CM ADVOCATES LLP ADVOCATE

AND

ANDREW OMANDI COLE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPHINE ELEANOR MOIKOBU) CLIENT

RULING

1. The Applicant herein has filed the instant Application dated the 1st February 2023; and in respect of which the Applicant seeks for the following reliefs;
 - i. The Honorable court be pleased to enter judgment in the sum of Kes.4, 643, 295.50/= Only, in terms of the certificate of taxation dated the 23rd January 2023.
 - ii. That a Decree be issued for enforcement/execution.
 - iii. Cost of the Application be provided for.
2. Instructively, the instant Application has been anchored on the grounds which have been alluded to and enumerated in the body of the Application. Furthermore, the Application is supported by the Affidavit of one, namely, Caroline Kendi Kithinji, Advocate, sworn on the 1st February 2023; and in respect of which, the Deponent has annexed a copy of the Certificate of taxation.
3. Upon being served with the instant Application, the Respondent/Client filed a Replying affidavit sworn on the 30th May 2023; and in respect of which, the Respondent has averred, inter-alia that the Applicant/Advocate herein duly entered into a retainer agreement with the Respondent; and thus the Applicant herein was not at liberty to file an advocate- client Bill of costs for taxation.



4. Additionally, the Respondent has contended that having entered into a retainer agreement, which remains binding on the advocate herein, the impugned certificate of taxation issued on the 23rd January 2023; was therefore issued in error and is thus unlawful and invalid.
5. Be that as it may, the instant Application came up for mention on the 31st July 2023; whereupon the advocate for the respective Parties covenanted to dispose of and/or ventilate the Application by way of written submissions. Consequently and in this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.
6. In compliance with the directions of the court, the Applicant/ Advocate filed written submissions dated the 29th August 2023; whereas the Client/Respondent filed written submissions dated the 4th September 2023. For good measure, both submissions are on record.

Parties' Submissions:

Applicant's Submissions:

7. The Applicant herein adopted the grounds contained at the foot of the Application and similarly reiterated the averments in the body of the supporting affidavit. Furthermore, the Applicant herein thereafter raised, highlighted and canvassed (2) salient issues for consideration by the Honourable court.
8. Firstly, Learned counsel for the Applicant has submitted that the Respondent herein duly instructed and retained the services of the Applicant to render legal services as pertains to civil proceedings *vide* ELC No. 190 of 2018 (O.S), wherein the advocate proceeded to and indeed vindicated the interests of the Respondent.
9. Additionally, Learned counsel for the Applicant has contended that despite the services rendered and/or provided by the Applicant/Advocate; the Respondent failed and/or neglected to pay the requisite professional charges to the Applicant and thus the Applicant herein was obliged to file an advocate client bill of costs.
10. It was the further submissions of counsel for the Applicant that thereafter the Advocate-Client bill of costs was duly taxed and certified by the taxing master; culminating into the issuance of a certificate of taxation dated the 23rd January 2023.
11. Furthermore, Learned counsel for the Applicant has submitted that following the issuance of the certificate of taxation, the Respondent herein filed an Application dated the 17th March 2023; wherein same sought for inter-alia an order to set aside the certificate of taxation and to strike out the bill of costs dated the 21st June 2021, which had hitherto been filed by the Applicant/Advocate.
12. Be that as it may, Learned counsel for the Applicant has submitted that the Application dated the 17th March 2023, which essentially challenged the certificate of taxation, was dismissed *vide* Ruling rendered on the 31st July 2023.
13. Premised on the foregoing, Learned counsel for the Applicant has thus submitted that the certificate of taxation which was issued by the taxing master has therefore not been challenged, varied and/or altered in any manner whatsoever.
14. Secondly, Learned counsel for the Applicant has submitted that insofar as the certificate of taxation has neither been varied nor set aside, it therefore behooves the Honorable court to proceed and enter Judgment in terms of the certificate of taxation. In this respect, Learned counsel for the Applicant has



invited the court to take cognizance of the provisions of Section 51(2) of the Advocates Act, Chapter 16 Laws of Kenya.

15. Additionally, Learned counsel for the Applicant has cited and relied on *inter-alia* the case of Otieno Yogo & Co Advocates versus Kisumu Water & Sewerage (2018)eKLR; Taib Ali Taib versus Jubilee Insurance Company Ltd (2018)eKLR; and Otieno Ragot & Co. Advocates versus Kenya Airports Authority (2021)eKLR, respectively.
16. Lastly, Learned counsel for the Applicant has submitted that there is no dispute as pertains to retainership and therefore there is no legal basis to deny and/or deprive the Applicant/Advocate of the Judgment in terms of the certificate of taxation.
17. Consequently and in view of the foregoing, Learned counsel for the Applicant has thus implored the court to find and hold that the application beforehand is meritorious and thus ought to be granted.

Respondent's Submissions:

18. The Respondent herein has adopted and reiterated the averments contained at the foot of the Replying affidavit sworn on the 30th May 2023; and thereafter same has highlighted and canvassed two (2) pertinent issues for consideration by the Honourable court.
19. First and foremost, Learned counsel for the Respondent has submitted that the Applicant and the Respondent entered into a retainer agreement which was generated by the Applicant herein and thereafter duly executed by the Respondent. In this regard, learned counsel for the Respondent has invited the attention of the court to the documents dated the 12th July 2016.
20. Secondly, Learned counsel for the Respondent has submitted that insofar as there was in existence a retainer agreement between the Applicant and the Respondent; it was therefore not open for the Applicant herein to proceed and file an Advocate- Client bill of costs for taxation or at all.
21. Additionally, Learned counsel for the Respondent has submitted that owing to the fact that the Applicant was not at liberty to file an Advocate- client bill of costs, for purposes of taxation; it therefore follows that the resultant certificate of taxation issued on the 23rd January 2023, is therefore illegal and invalid.
22. Arising from the foregoing, Learned counsel for the Respondent has therefore contended that the instant Application dated the 1st February 2023; and which seeks Judgment on the basis of certificate of taxation, is therefore devoid of merits and thus ought to be dismissed.
23. In support of the submissions on behalf of the Respondent, Learned counsel has cited and relied on *inter-alia* the case of Republic vs Chief of General Staff & Another (2017)eKLR and Omulele & Tolo Advocates vs Mount Holding Ltd (2016)eKLR, respectively.
24. Flowing from the foregoing, counsel for the Respondent has urged the court to find and hold that the Application is devoid of merits and thus same ought to be Dismissed with costs to the Respondent.

Issues For Determination:

25. Having analyzed the Application dated the 1st of February 2023; as well as the Response thereto; and upon taking into account the written submissions filed by the respective Parties, the following issues do emerge and are thus worthy of determination;
 - i. Whether the certificate of taxation issued on the 23rd January 2023 has been set aside and/or varied or otherwise.



- ii. Whether the Applicant herein has satisfied the requisite ingredients envisaged under Section 51(2) of the *Advocates Act*, Chapter 16 Laws of Kenya or otherwise.

Analysis And Determination

Issue Number 1 Whether the certificate of taxation issued on the 23rd January 2023 has been set aside and/or varied or otherwise.

26. It is instructive to state and observe that the Respondent herein duly retained and/or engaged the services of the Applicant, with a view to defending civil proceedings vide Milimani ELC no. 190 of 2018 (OS).
27. Pursuant to and arising from the named engagement, the Applicant herein thereafter filed the requisite pleadings and documents for and on behalf of the Respondents/Client. However, it appears that the advocate client relationship between the Applicant and the Respondent, soured and/ or broke down culminating into the Applicant filling an Advocate- Client bill of costs.
28. Subsequently, the Advocate-Client bill of costs dated the 21st June 2021; was subjected to taxation and same was ultimately taxed, culminating into the issuance of a certificate of taxation. For good measure, the certificate of taxation is dated the 23rd January 2023.
29. Suffice it to point out that the bill of costs filed by and on behalf of the Respondent herein was duly defended by an advocate retained and/or instructed by the Respondent herein. Consequently, there is no gainsaying that the certificate of taxation that was ultimately issued, was issued with the knowledge of and following the participation of the Respondent herein.
30. Be that as it may, after the issuance of the certificate of taxation, the Respondent herein filed and lodged an Application dated the 17th March 2023; and in respect of which same sought for a plethora of reliefs, inter-alia setting aside of the certificate of taxation and striking out of the advocate client bill of costs.
31. Nevertheless, the Application dated the 17th March 2023; was canvassed before this court and thereafter a Ruling was rendered in respect thereof. For coherence, the ruling was rendered on the 31st July 2023, whereupon the impugned Application was dismissed.
32. Essentially, upon the dismissal of the Application dated the 17th March 2023, the certificate of taxation, which was sought to be set aside and/or varied, was found to be lawful and thus same was affirmed by this Honourable court.
33. Other than the foregoing it is imperative to point out that upon the delivery of the Ruling rendered on the 31st July 2023; the Respondent herein was at liberty to prefer an Appeal to the Honorable Court of Appeal, albeit with leave. However, no such appeal was filed and thus the certificate of taxation issued on the 23rd January 2023, remains in situ.
34. Arising from the foregoing, my answer to issue number one is to the effect that the certificate of taxation issued on the 23rd January 2023; has neither been set aside, varied nor rescinded, whatsoever.

Issue Number 2 Whether the Applicant herein has satisfied the requisite ingredients envisaged under Section 51(2) of the *Advocates Act*, Chapter 16 Laws of Kenya or otherwise.

35. Pursuant to and by dint of the provisions of Section 51(2) of the *Advocates Act*, Chapter 16 Laws of Kenya, an Applicant desirous to procure and/ or obtain Judgment on the basis of a certificate of taxation, is obligated to prove and establish the existence of two critical ingredients.



36. For good measure, such an Applicant is called upon to establish and demonstrate to the court that the certificate of taxation which anchors the Application for entry of Judgment has neither been set aside nor varied; and secondly, that there is no dispute as pertains to retainer.
37. Perhaps, given the centrality of the provisions of Section 51(2) of the Advocates Act, in the determination of the subject dispute; it is appropriate to reproduce the named provisions of the law.
38. For ease of reference, Section 51(2) of the Advocates Act, is reproduced as hereunder;
51. General provisions as to taxation
- (1) Every application for an order for the taxation of an advocate's bill or for the delivery of such a bill and the delivering up of any deeds, documents and papers by an advocate shall be made in the matter of that advocate.
- (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 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.
39. From the clear and explicit provisions, which have been reproduced vide the preceding paragraph, the court herein is called upon to grapple with and to resolve the two salient issues which have been highlighted in the named provisions of the law.
40. To start with, it is incumbent upon this court to discern and/or decipher whether the certificate of taxation has indeed been altered, set aside and/or varied. However, whilst discussing issue number one herein before, this court has found and held that the certificate of taxation issued on the 23rd January 2023, has neither been set aside, altered and/or varied, in any manner whatsoever.
41. Secondly, the court is called upon to interrogate and ascertain whether there is any dispute as pertains to retainer. Be that as it may, it is my humble conclusion that the dispute as pertaining to retainer can only arise if and where the Respondent; has filed a Reference or if the reference has since been determined, whether an appeal has been mounted.
42. However, in respect of the instant matter there is no pending application pertaining to and or concerning the question of retainer; and neither is there any appeal mounted against the Ruling of the court delivered on the 31st July 2023.
43. Notably, there is no dispute as pertains to retainer. In any event, even the submissions filed by and on behalf of the Respondent herein highlight and confirm that indeed there was retainer.
44. Based on the foregoing, the question that then remains outstanding is whether the Applicant herein has satisfied the requisite ingredients prescribed vide the provisions of Section 51(2) of the Advocates Act; and if so, whether Judgment ought to be entered on the basis of the certificate of taxation.
45. To my mind, the Applicant has duly established and demonstrated that the certificate of taxation has neither been set aside nor varied; and in this regard, the Applicant is therefore entitled to entry of Judgment on the basis of the certificate of taxation.
46. To buttress the foregoing position and essentially that a certificate of costs which has not been set aside and/or varied entitles the Applicant to Judgment; it is imperative to adopt and reiterate the holding in the case of Otieno Yogo & Co Advocates vs Kisumu Water & Sewerage Co Ltd (2018)eKLR, where the Honorable court stated thus;



6. In the present case, the Respondent objects to the entire bill and alleges that the Advocate was instructed by Housing Finance Company of Kenya Limited and not by the Respondent. In my view, the Applicant was required to file a reference to this Court to challenge the decision of the taxing officer and not come by way of a replying affidavit. As it stands now the Certificate of Taxation has not been set aside or altered. In the circumstances, I see no reason to deny the Advocate, Judgment as sought.
47. Additionally, the legal import and tenor of the provisions of Section 51(2) of the *Advocates Act*, Chapter 16 Laws of Kenya was also elaborated upon and duly explained by the court in the case of *Taib Ali Taib Advocates vs Jubilee Insurance* (2018)eKLR.
48. For coherence, the court stated and observed as hereunder;
9. The law on recovery of costs by advocate against a client is that a bill of costs is filled in a miscellaneous application. Once bill is taxed and a certificate issued, the certificate is by Section 51 *Advocates Act*, ordained final on the quantum of the costs between advocate and client until and unless set aside and is due for conversion into a judgment at the instance and application of the advocate only subject to retainer being in dispute.
10. The procedure of upsetting a certificate of taxation once issued is provided under Rule 11 of the Advocate, Remuneration Rules. In this matter therefore, it is not undisputed that a Bill was presented in the manner prescribed, taxed and a certificate of costs issued. That certificate has become final on the question of quantum or measure of the costs between counsel and his client unless an appropriate reference be lodge and determined to the contrary.
49. Before departing from the subject issue, it is imperative to also take cognizance of the position taken by the Court of Appeal in the case of *Otieno Ragot & Co Advocates vs Kenya Airports Authority* (2021)eKLR, where the court stated as follows;
- “In other words, unless set aside or altered, the party and party bill in respect of the same suit having already undergone the scrutiny of a taxing officer who had exercised discretion to arrive at a determination of the just party and party fees, and with it the instruction fees, the issue of the quantum of the advocates’ instruction fees was effectively disposed of at that time. As such, that decision was final and binding on the concerned parties. It was therefore not a matter that was capable of being reopened by another taxing court with concurrent jurisdiction. And if Parliament had intended it to be otherwise, nothing would have been easier than for this to have been spelt out in express terms in the Order.
- Since I have not been shown that either the subject matter or the instruction fees were ever challenged following that taxation and the subsequent issuance of a Certificate, the only conclusion that can be reached is that, the instruction fees discerned in the party and party proceedings for HCCC No. 156 of 2009 remained the basic instruction fees that were applicable to the Advocate and client bill of costs”.
50. Simply put, I come to the conclusion that the Applicant herein has truly and justly demonstrated that the requisite ingredients stipulated vide Section 51(2) of the *Advocates Act*; have been established. In this regard, the Applicant is thus entitled to Judgment on the basis of the certificate of taxation.

Final Disposition:

51. From the foregoing discourse, it is crystal clear that the certificate of taxation dated the 23rd January 2023, has neither been set aside, varied nor rescinded.



52. Consequently and in the premises, the Applicant herein is justly entitled to Judgment on the basis of certificate of taxation. In this regard, the Application dated the 1st February 2023; be and is hereby allowed on the following terms;

- i. Judgment be and is hereby entered in favor of the Applicant in the sum of Kes.4, 643, 295.50/ = only in terms of the certificate of taxation dated the 23rd January 2023.
- ii. A decree be and is hereby issued on the basis of the Judgment herein.
- iii. Costs of the Application assessed and certified in the sum of Kes.30, 000/= only be and are hereby awarded to the Applicant.
- iv. The Applicant is at liberty to execute for the decretal sum, (details in terms of the preceding clauses).
- v. Nevertheless and to facilitate payment of the Decretal sum, there be and is hereby granted an Order of Stay of Execution for 30 Days from the Date hereof.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Mr. Arnold Oriwa for the Client/Respondent.

Ms. Kendi for the Advocate/Applicant.

