



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

MISCELLANEOUS CIVIL APPL. NO. 82 OF 2020

CHRISTINE JAMES KIOKO (suing a legal Representative of the estate of

JAMES MUTINDA KIOKO (Deceased).....APPLICANT/CLIENT

VERSUS

J. A MAKAU & CO & ADVOCATES.....RESPONDENT/ADVOCATE

RULING

1. The Applicant filed a notice of Motion dated 8/12/2020 pursuant to Order 2 Rule 15 (i), (d) Rule 13 (3) of the Advocates Remuneration Order and seeks for an order that the respondent's Advocate/ Client Bill of costs dated 11/9/2020 be struck out with costs.
2. The application is supported by the grounds set out on the face thereof as well as a supporting affidavit of the applicant sworn on even date. The applicant's case is inter alia; that she had instructed the Respondent to represent her in a road traffic accident case wherein her husband had died; that the case took about six years to be concluded wherein she was awarded a total sum of Kshs.1,441,460/=; that the Respondent gave her a rough time in the case as it did not represent her fully in the case and which prompted her to lodge a complaint with the Law Society of Kenya; that the Respondent later filed an application to cease acting for her and thereafter, she had to act in person and she managed to execute the decree; that the Respondent later filed a bill of costs and obtained an order barring her from accessing the decretal sums; that the Respondent was to act for her and later recover its fees out of the decretal sums at 30% thereof but even then she has paid a sum of Kshs 119,000/= that was demanded by the Respondent on diverse dates; that the respondent did not manage to recover money on behalf of the applicant and thus it is improper for the respondent to claim fees which it had not earned; that the respondent's bill of costs is incompetent for want of compliance with section 48 (1) of the Advocate's Act; that the bill of costs does not comply with rule 13 (3) of the Advocates Remuneration Order and hence there is no competent bill capable of being taxed.
3. The application was opposed by the Respondent vide a replying affidavit sworn on 10/12/2020 by Mutua J. Makau Advocate who described himself as a proprietor in the law firm of the Respondent herein. The Respondent's case is inter alia; that it represented the Applicant successfully in the civil case until execution though the execution of the decree failed; that the applicant upon failure by the Auctioneer to trace the whereabouts of the judgement debtor started casting aspersions and began complaining that the Respondent was not serving her interests and proceeded to lodge complaints to the Law Society of Kenya forcing the Respondent to apply to cease acting for her; that as no appeal has been preferred against the judgement obtained in favour of the Applicant in the primary suit namely **Machakos CMCC No. 1163 of 2008**, then the Respondent's fees ought to be paid; that the Applicant admits vide annexure CJK2 that she is indebted to the respondent regarding legal fees; that fees of an Advocate for work done ought to be paid regardless of whether the Advocate ceases to act; that the Respondent was not at the time offering pro-bono services to the Applicant; that the law is clear that the fees of an Advocate is unconditional.
4. Learned counsels for the parties filed an exchanged written submission. The applicant's submission are dated 23/2/2021 while those of the respondent are dated 25/2/2021.
5. Learned counsel for the Applicant raised four grounds warranting the striking out of the respondent's bill of costs. Firstly, it was submitted that the bill of costs is premature as it does not comply with section 48(1) of the Advocates Act in that it failed to serve the client with an itemized bill in block form before filing it within 30 days upon service. Secondly, it was submitted that the bill does not comply with Rule 13(3) of the Advocates Remuneration Order which stipulates that the bill be filed in a miscellaneous cause and in the matter of the Advocate but not in the name of the parties in the primary suit. Reliance was placed in the case of **Sharma Vs. Uhuru Highway Development Limited [2001] eKLR**. Thirdly, it was submitted that the respondent having voluntarily filed an application to cease acting for a client cannot file a bill of costs. Learned counsel added that even though the respondent had been retained on contingency basis and was to be paid 30% of the sums to be recovered, he withdrew before recovering the money and hence the principle of 'no win no pay' must apply. The

case of **Kamonjo Kiburi T/a Kamonjo Kiburi & Co. Advocates Vs. UAP Insurance Co. Ltd [2019] eKLR**. Finally, it was submitted that the bill is incompetent as the same seeks to tax the administratrix in her personal capacity instead of against the estate of the deceased. Counsel further contended that if the bill of costs is allowed as drawn, then it will amount to unjust enrichment of the advocate at the expense of the estate of the deceased when in fact the decretal sums have not been recovered.

6. Learned counsel for the Respondent raised one issue for determination namely whether an advocate is entitled to fees due by his/ her client after work done. Counsel submitted that it is not in dispute that the Respondent acted as the advocate for the Applicant in the primary suit as her advocate in the recovery of damages arising from a road traffic accident as the same has been admitted by the Applicant in the supporting affidavit sworn on 8/12/2020. It was contended by the Respondent that the Applicant has not paid fees for services rendered. It was also contended that the Respondent is entitled to tax his bill even though he had ceased acting before the recovery of the decretal sums. Reliance was placed in the case of **Mwangi Kengara & Company Advocates v Invesco Assurance & Company Limited [2014] eKLR** and the case of **Macharia and Co Advocates –vs- Magugu [2002 eKLR]**. It was also submitted that the Respondent has not violated section 48 of the Advocates Act as well as Rule 13(3) of the Advocates Remuneration Order. Finally, it was submitted that the Applicant has been properly sued as she is the legal representative of the estate of the deceased and that she is the one who had given instructions to the Respondent to file the suit on her behalf. The Respondent sought that the application dated 8/12/2020 be dismissed with costs.

7. I have given due consideration to the rival affidavits and the submissions herein. It is not in dispute that there was an advocate/client relationship between the respondent and the applicant respectively before the same became sour forcing the respondent to cease acting for her. It is also not in dispute that at the time the respondent withdrew from acting for the applicant, the primary suit had been concluded save only that the decretal sums had not been recovered from the judgement debtor. That being the position, the following issues are necessary for determination namely:

- i) Whether an advocate who has ceased to act for a client is entitled to be paid fees for services rendered up to the point he/she ceased to act;*
- ii) Whether the Respondent's bill of costs merits taxation;*
- iii) Whether the Applicant's application dated 8.12.2020 has merit;*
- iv) What orders can the court grant?*

8. As regards the first issue, it is noted that the Respondent filed an application to cease acting for the applicant after his relationship with her became untenable. The Applicant had lodged a complaint with the Law Society of Kenya and vide a letter dated 30.1.2019 (CJK4") she was advised to seek alternative legal representation and further advised that the Advocate was at liberty to tax his bill of costs to recover his legal fees for the work done. Indeed, the Respondent upon ceasing to act for the applicant filed his bill of costs which is now contested by the applicant on grounds that the same offends the provisions of the Advocates Act and the Advocates Remuneration Order and that the court should adopt the principle of "No win No pay" as the respondent did not conclude the primary suit. As the respondent had been under a retainer as confirmed by the applicant, it is my considered view that the advocate is entitled to file his/her bill of costs. It is further my view that an advocate who has been instructed to act for a client has a legitimate expectation that his/her legal fees will be paid by the client whether or not the advocate/client relationship is severed. The Respondent has already clarified that he was not offering pro bono services to the applicant and now requires to be paid for the work so far done. It would be unfair and unjust to deny the respondent his right to seek for his legal fees for work done. It is a misconception on the part of the applicant to suggest that the respondent having applied to cease acting for her is not entitled to demand for his legal fees. It must be noted that the respondent was compelled to apply to cease acting after the applicant lodged a complaint against him to the Law Society of Kenya. An advocate is entitled to pursue for his/her legal fees from an erstwhile client even after ceasing to act for that particular client. In the case of **Mwangi Kengara & Co Advocates v. Invesco Assurance Co. Ltd [2014] eKLR** it was held that an advocate is entitled to fees for the services rendered to the client and that whether an advocate decides to cease acting or services terminated by the client, the advocate should charge a fee for the services rendered until the time their relationship comes to an end.

The Applicant's counsel has cited the case of **Kamonjo Kiburi T/a Kamonjo Kiburi & Co Advocates v UAP Insurance Co. Ltd [2019] eKLR** and contended that the respondent having ceased to act for the applicant before conclusion of the suit is not entitled to costs. Upon perusal of the said authority, I find that the same is easily distinguishable since the matter involving the applicant was already concluded as judgement was entered with no appeal being preferred by the judgement debtor whereas in the cited case the matter went on appeal after the counsel had ceased to act. The relationship between the applicant herein and the respondent turned sour during the failed execution of the decree which led to the respondent ceasing to act for her.

9. As regards the second issue, the applicant has maintained that the respondent's bill of costs pending determination violates the provisions of section 48 of the Advocates Act and Rule 13(3) of the Advocates Remuneration Order and which should be struck out. There is need to look at these two provisions so as to establish whether the respondent's bill of costs is properly before the court.

"Section 48(1)-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.

(2) Subject to subsection (1), a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction.

(3) Notwithstanding any other provision of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed."

Rule 13(3) of the Advocates Remuneration Order provides as follows:

“The bill of costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but no advocate shall be entitled to an instruction fee in respect thereof.”

Looking at the above two provisions of the law, I find that no suit has been filed against the applicant by the respondent as contended by the applicant since the only matter that has been lodged is the bill of costs which has been instituted via a miscellaneous cause as herein. I am unable to see any irregularity in the respondent’s bill of costs. In any event the provisions of article 159(2) (d) of the constitution mandates the courts to administer justice without undue regard for procedural technicalities. There is no prejudice to be suffered by the applicant if the bill of costs is canvassed as she has an opportunity to contest the items therein. Indeed, the applicant has averred that she had made some part payments of the legal fees amounting to Kshs 119,000/ and hence she should allow the bill of costs to be canvassed so that she can challenge the items in the bill.

The applicant has also taken issue with the respondent’s bill of costs on the ground that the administratrix should not have been sued but the estate of the deceased instead. I find such a contention to be misplaced in that the applicant having taken out letters of grant of administration intestate of the deceased assumed the role of a legal representative of the estate and agreed to file suit on behalf of the estate. It is the same applicant who actually approached the respondent and gave him instructions to file suit to recover damages on behalf of the estate. The respondent did just that and from then on the applicant became his client until the time the respondent ceased from acting for her. The applicant who was the instructing client cannot now turn around and deny such a glaring fact without blinking an eyelid. For all intents and purposes, the applicant being the legal representative of the estate of the deceased had capacity to sue in the primary suit and still had capacity of being sued by her erstwhile advocate as herein since she is the one who took out letters of grant of administration intestate in the estate of the applicant’s late husband. I am satisfied that the applicant has been properly sued in the miscellaneous cause and she cannot hide behind the estate of her late husband to avoid participating in the taxation of the respondent’s bill of costs. Hence, I find the respondent’s bill of costs dated 11.9.2020 merits to be set down for taxation.

10. As regards the third issue and in view of the observations in paragraphs 8 and 9 above, the Applicant’s application dated 8.12.2020 is meant to deny the Respondent an opportunity to have his bill of costs taxed so as to obtain his just dues in form of legal fees owed by the applicant. I find the application to be without any merit whatsoever.

11. In the result, it is my finding that the Applicant’s application dated 8.12.2020 lacks merit. The same is dismissed with costs. Parties should now proceed to set down the bill of costs dated 11.9.2020 for taxation before the Deputy Registrar.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 13TH DAY OF MAY, 2021.

D. K. Kemei

Judge