



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: D. K.Kemei, J)

MISC. APPLICATION NO. 98 OF 2020

IN THE MATTER OF ADVOCATES/CLIENTS BILL OF COSTS

JAPHETH K. MWALIMU T/A J.K MWALIMU & COMPANY ADVOCATES.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF KITUI.....RESPONDENT

Arising from

HIGH COURT OF KENYA AT MACHAKOS CIVIL NO.267 of 2013

BETWEEN

KINYUA MUSYOKI & COMPANY ADVOCATES.....APPLICANT

AND

MUNICIPAL COUNCIL OF KITUI, KITUI MUNICIPALITY BOARD.....RESPONDENT

RULING

1. Vide a Notice of Motion dated 21st April, 2021, the Applicant seeks the following orders:-

1. **THAT** this Honourable court be pleased to enter judgement against the Respondent for the sum of Kenya Shillings One Hundred and Twenty Eight Thousand, Six Hundred and Twenty, Eighty Six Cents (Kshs. 128,620.86/-).

2. **THAT** this Honourable court be pleased to award interest at 14% from 5th February 2021 until payment in full.

3. **THAT** the costs of this application be borne by the Respondent

2. The application is based on the grounds that the Respondent has failed, refused and neglected to pay and/or settle the Applicant's fees despite the Applicant filing a bill of costs dated 7th August 2020 against the Respondent which the taxing officer taxed the same in the sum of Kshs. 128,620.86/-.

3. *Japheth K. Mwalimu* an advocate practicing in the name and style of the Applicant swore a supporting affidavit on 21st April 2021 in support of the application herein. He avers that he acted for the Respondent in *Machakos Misc. Application No. 267 of 2013 Kinyua Musyoki & Company Advocates vs Municipal Council of Kitui & Another* to oppose a Bill of Costs dated 31st October, 2013. According to the Advocate, the professional fees charged for representing the Respondent was not paid necessitating the filing of an Advocates/Clients Bill of costs. He avers that the Certificate of Taxation and a letter dated 29th March 2021 were served upon the Respondent on 31st March 2021 calling for payment of the taxed amount but the Respondent has failed to pay. The advocate urged the court to allow the application to facilitate execution.

4. In response to the Notice of Motion, the Respondent's County Attorney Caroline Musango swore a replying affidavit on 29.6.2021. She avers that the Applicant should prove instructions given to the firm to represent the Respondent and payment after completing the alleged task. According to the County Attorney, no Notice of Taxation was served upon the Respondent. She avers that the said letter and Certificate of Taxation stated by the Applicant were served upon the Respondent on 31st March 2021 and hence the Respondent was awaiting the hearing of the matter so as to get clarification from the Applicant in the matters. The County Attorney is opposed to the application for lack of proof.

5. In response, the Applicant's advocate swore a supplementary affidavit on 5th July 2021 in support of the application. He avers that the Respondent's County Attorney's affidavit is frivolous, vexatious and an abuse of the court process. According to the advocate, the issue of instructions is a non-issue since the Instruction letter dated 22nd November 2013 attached and marked as 'JKM3' confirms the Respondent's instruction to the Applicant. In response to paragraph 6 of the County Attorney's affidavit, the advocate avers that the Respondent was duly served with the Bill of costs and the Taxation Notice as per the affidavit of service and attachments thereto marked as 'JKM 4'. According to the Advocate, the failure to challenge the taxation award renders the opposition a mere academic exercise. It is urged by the Applicant's advocate that the objection should be dismissed with costs as prayed.

6. I have considered the grounds set out in the application as well as the affidavits in support and in opposition thereof. Essentially the application seeks the entry of judgment in accordance with the certificate of taxation dated 5th February, 2021.

7. The Notice of Motion is brought under *Section 51 (2) of the Advocates Act* which provides:-

"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."

8. Section 51(2) of the Advocates Act is clear that a certificate of taxation is final unless and until it is set aside or varied. The court in *Owino Okeyo & Company Advocates v Fuelex Kenya Limited [2005] eKLR* held that:-

"In my understanding of the provisions of Section 51 (2) of the Advocates Act, it enables an advocate to get judgment for the taxed costs...provided that his client did not dispute the fact that the advocate had been instructed (or retained) in the first instance."

9. Similarly, in *Lubulellah & Associates Advocates vs. N K Brothers Limited [2014] eKLR* court held that:

"The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgement."

10. In paragraph 2 of the Applicant's advocate supporting affidavit, the advocate avers that the Applicant was instructed to act for the Respondent in *HCC Misc. Application No. 267 of 2014, Kinyua Musyoki & Company Advocates vs Municipal Council of Kitui & Another*. In the annexure 'JKM-3' attached to the supplementary affidavit, the matter is listed as one of the cases allocated to the Applicant for action and hence there is no doubt that the Applicant acted in the matter. According to the affidavit of service sworn on 20th August 2020 attached as annexure 'JKM4', it is noted that the Respondent was served with a copy of the Taxation Notice dated 17th August 2020 and the Bill of Costs dated 7th August 2020 but did not file any documents in response thereto. It is also noted that the Respondent has not challenged the ruling of the taxing officer delivered on 3rd February 2021 as envisaged under Rule 11 of the Advocates Remuneration Order. The taxing officer issued a Certificate of Taxation on 17th February 2021 which is attached as 'JKM-1'. The same has not been challenged. In the circumstances, the order to enter judgment pursuant to the certificate of taxation is merited.

11. As regards prayer (b), the Applicant seeks interest to be awarded at 14% from 5th February 2021 the date the certificate of Taxation was granted. The purpose of awarding interest is well expressed in the case of *Prem Lata vs. Peter Musa Mbiyu [1965] EA 592* where the court held:

"In both these cases, the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest."

12. Under *Paragraph 7 of the Advocates (Remuneration) Order* it is provided that:-

"An advocate may charge interest at 14 percent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full"

13. It therefore follows that the rate of interest awardable is 14% per annum payable from the 30th day from the date on which the Bill of Costs was delivered. The affidavit of service attached as annexure 'JKM4' indicates that the Bill of costs was served on 20th August 2020 upon the Respondent. It therefore follows that the interest would then start to accrue from 20th September, 2020. However, the applicant has requested to have the interest commence from the 5th February 2021 and which request will be allowed.

14. In the result, I find the notice of motion dated **21st April 2021** has merit. The same is allowed as prayed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 10TH DAY OF SEPTEMBER, 2021

D. K. KEMEI

JUDGE