



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC. CIVIL APPLICATION NO. 225 OF 2016

MUEMA KITULU T/A

MUEMA KITULU & CO. ADVOCATES.....APPLICANT

VERSUS

GATEWAY INSURANCE CO. LTD.....RESPONDENT

RULING

1. This is the notice of motion dated 7th February 2018 seeking the following orders:

a) THAT this Honourable court be pleased to enter Judgement against the respondent for the sum of Kenya shillings one hundred thousand five hundred and seventy-six (100,576.00)

b) THAT this Honourable Court be pleased to award interest at 14% from the date of filing the bills of costs (24th May 2016) until payment in full.

2. The same is premised on the grounds on its face and the supporting affidavit by Mr. Muema Kitulu an advocate of the High Court of Kenya.

3. The main ground is that the applicant's law firm was retained by the respondent to act for its client following a road accident **in Milimani CMMCC NO.306 of 2008: Mathew Maina Vs William Kamunya Mwangi.**

4. Upon failure to pay his fees counsel filed an advocate /client bill of costs dated 24th May 2016 which was taxed and an award made on 14th December 2017 in his favour for ksh. 100,576/= (MK-1 is the certificate of taxation).

5. He has averred that he sent the respondent a demand letter (MK2) seeking payment of the taxed costs but the same have never been paid, hence this application.

6. A replying affidavit was filed by Joan Oburu a senior Legal Officer at Sanlam Insurance company Limited, the respondent. She averred that the taxation was done without the original file (Njeri CMCC No. 306 of 2008) and was therefore irregular. She depones that the applicant had been paid shs. 24,905/= (JO 1 & 2) and was also not entitled to interest, as he never served them with a demand letter before filing the bill of costs. She further deponed that this suit was consolidated with other matters and the taxing master failed to address each suit separately.

7. The application was canvassed by way of written submissions. Counsel for the applicant (A.M. Mbindyo and company advocates) filed the submissions dated 26th October 2018. He submitted that the deponent lacked the authority to swear the replying affidavit. Further that the respondent never objected to the Jurisdiction of the taxing master during the process. He argued that in any event the High Court has unfettered Jurisdiction. He referred to article 165 (3) of the constitution, sections 3, 3A and 5 of the Civil Procedure Act and Rules 49 (1) and (2) of the Advocates Remuneration Order.

8. On the issue of lack of the original file it is his submission that the same is not provided for under the Advocates Remuneration Order. He admits receipt of kshs. 24,905/= which he expected to be deducted from the taxed amount.

9. He contends that there was sufficient communication between the parties, prior to the filing of the bill of costs and no objection was raised during the taxation period. Counsel contends that the respondent's counsel has raised matters totally unrelated to the application before this

court. The issues being raised ought to have been raised vide an objection under Rule 11 of the Advocates Remuneration Order. He also relies on section 51 (2) of the Advocates Act which states:

“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.”

10. Mugambi Mugania and company advocates for the respondent filed submissions dated 7th December 2018. It is counsel’s submission that the bill being taxed arose from Nyeri RMCC NO 306 of 2008 which ought to have been taxed by the deputy registrar Nyeri High Court. Further that the applicant had been paid his legal fees hence no service of a demand letter was made. He challenges the consolidation of this application plus eight (8) other bills of costs. It is his submission that the bills should not have been taxed together. Based on the above counsel refers to the case of **Moses Mwicigi & 14 others Vs Independent Electoral and Boundaries Commission and 5 others {2016} eKLR** arguing that the applicant failed to follow due process. The other cited cases on assessment of damages are not applicable.

Analysis and determination

11. I have considered the application, affidavits and submissions. The only issue for determination is whether Judgment should be entered in favour of the applicant or not. However, before I get there I wish to point out two things as follows:

i) On 30th June 2016 the deputy registrar Hon. R Makungu ordered this file plus seven (7) other files to be heard simultaneously as the application dated 27th June 2016 was not opposed. The other files were not itemized and there is nothing else stated about them since then. Counsel appears to have mistaken this to be a consolidation of the files. Unless another order for consolidation was made in another file there is no order for consolidation in this file. This file was dealt with as a single file and that remains the position.

ii) A notice of motion dated 4th April 2018 filed by the respondent was heard and allowed by Justice Kamau on 28th May 2019. The honourable Judge gave specific directions. The respondent was to file a Reference in respect to the taxation award. Timelines were given. I have perused this file and there is no Reference filed herein.

12. The Reference would have served as an objection to the taxed bill. In its absence there is no valid objection to the taxed bill. Section 52 (2) of the Advocates Act is clear on this.

13. Counsel for the respondent has submitted that the suit in which the services were rendered is Nyeri PMCC No. 306 of 2008 and ought to have been taxed in Nyeri High Court. The documents filed herein show that the lower court file is Milimani CMCC No. 306 of 2008. There is no document filed by the respondent to show that indeed this was a Nyeri court matter. Counsel for the respondent cannot say they were not able to get any documents from Nyeri Chief Magistrate’s court or even documents in their own possession to support their allegation. That claim is therefore not supported.

14. The respondent has besides showing that the applicant had been paid ksh 24,905/= (which the applicant has admitted) not pointed out any item which was not taxed according to the schedule.

15. I therefore find the bill of costs to have been properly taxed at kshs.100,576/=. It is allowed less ksh. 24,905/=.

16. I therefore enter Judgment for the applicant for the sum of ksh.75,671/= (seventy-five thousand, six hundred and seventy-one shillings only, with interest at court rates from date of taxation until payment in full.

Costs to the applicant

Orders accordingly.

DELIVERED ONLINE SIGNED AND DATED THIS 21ST DAY OF SEPTEMBER 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG’UDI

JUDGE