



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 307 OF 2015

W.G. WAMBUGU &

COMPANY ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

NZOIA SUGAR COMPANY LIMITED.....CLIENT/RESPONDENT

OPINION

1. Pending before this court for determination are two (2) concurrent applications. The first application is the Notice of Motion dated 19th September, 2016 taken out by the advocate/applicant. The motion is supported by the grounds set out on the face of the motion and the facts deposed in the affidavit sworn by Wanja G. Wambugu. The applicant sought for the following orders:

i. Spent.

ii. THAT judgment be entered for the applicant in the sum of Kshs.1,112,445.70 only be the taxed cost plus interest at the rate of 14% p.a. to date. The said sum continues to attract interest until payment in full.

iii. THAT costs of the application herein be provided for.

2. The client/respondent put in the Grounds of Opposition dated 5th October, 2016 to oppose the first application, raising the following grounds:

a) THAT the Notice of Motion is incompetent, misconceived and an abuse of the process of the court.

b) THAT the applicant has not complied with the mandatory provisions of the law relating to approval of decrees.

c) THAT the applicant has been overpaid in terms of legal fees and her intention to execute the decree to enforce payment of fees is illegal, oppressive and amounts to blackmail.

d) THAT it is not entitled to any further payment of fees but ought to refund excess fees to the firm.

3. The second application is the Notice of Motion dated 5th October, 2016 brought by the respondent and supported by the grounds presented in its body and the facts attested to in the affidavit of Rita Mukhongo. The following are the orders sought therein:

a) THAT there be a stay of execution of the decree pending the taking of accounts between the parties herein.

b) THAT there be an order of an account by the respondent (being the applicant herein).

c) THAT this Honourable Court do make a declaration that the respondent (being the applicant herein) are not entitled to any further payment of fees upon taxation of costs on the advocate/client basis made on 6th September, 2016 and any overpayment be refunded to the applicant (the respondent herein).

d) THAT costs of the Motion be granted to the applicant (the respondent herein).

4. Going by the averments made by the applicant in its submissions, it had filed a replying affidavit in response to the second application. However, this court notes that the replying affidavit was missing from the court file.

5. Be that as it may the record shows that the applicant had put in the notice of preliminary objection dated 29th November, 2016 to challenge the second application on the basis that this court lacks jurisdiction to grant the orders sought and that there is no decree or order capable of being executed, in order to warrant the order for a stay of execution sought. It is apparent from the record that the applicant later abandoned the preliminary objection since no further reference was made to it.
6. This court gave directions to the parties to file written submissions. At the time of writing this ruling, this court only had the submissions by the applicant.
7. I have considered the grounds laid out on the face of the respective Motions, the facts deponed in the affidavits supporting the respective Motions, the Grounds of Opposition and the submissions on record and authorities cited.
8. I will begin with the second application. It is apparent that the orders; though three-fold in nature, are related. I will therefore address them contemporaneously.
9. The first set of orders sought therein is for an account to be taken by the applicant and for a stay of execution to be granted in the meantime; whereas the second substantive order is for a refund of the sums overpaid by the respondent to the applicant.
10. In her affidavit in support thereof, Rita Mukhongo who is the Legal Officer of the respondent states that the respondent had initially paid a sum of Kshs.2,050,000/= to the applicant in legal fees for its legal services and representation in High Court Civil Appeal No. 86 of 2009 (Nzoia Sugar Company Limited v Capital Insurance Brokers Limited) but that upon conclusion of the appeal, the applicant demanded for additional sums in legal fees.
11. The deponent further states that the applicant is now claiming the sum of Kshs.1,096,050/= pursuant to the taxation proceedings and has threatened to execute in default thereof; and yet the respondent is not indebted to the applicant.
12. The deponent states that in actual fact, it is the applicant who is indebted to the respondent in the sum of Kshs.953,000/= being the sums paid over and above the legal fees agreed upon between the parties.
13. In retort, the applicant while admitting to receipt of the sum of Kshs.2,050,000/= from the respondent, states that the said sum was discounted from the Advocate-Client Bill of Costs filed in the matter and hence the respondent is still indebted to the applicant.
14. Upon my perusal of the record, I note that the averments made by the applicant are supported by the documents on record, specifically that the Advocate-Client Bill of Costs dated 9th July, 2015 filed by the applicant indicates that out of the total amount sought therein, the sum of Kshs.2,050,000/= was to be taxed off.
15. The record also shows that the taxing master delivered the ruling on the taxation proceedings on 11th August, 2016 and that subsequently, a certificate of taxation was issued on 6th September, 2016 in the sum of Kshs.1,096,050. There is nothing to indicate that the respondent either challenged the taxation proceedings or sought to have the ruling on taxation set aside.
16. In view of the foregoing circumstances, I have no basis on which to grant the orders sought in the Motion dated 5th October, 2016 and the same is hereby dismissed with costs to the applicant.
17. Concerning the first application which as earlier indicated sought for the entry of judgment pursuant to the certificate of taxation, the applicant states and submits that the taxed sum of Kshs.1,096,050/= together with interest stands now stands at Kshs.1,112,445.70 and that demand for payment has already been made to the respondent.
18. The provision of Section 51(2) of the Advocates Act cited by the applicant is well settled that a certificate of taxation is final unless and until it is set aside or varied. The court in the case of **Lubulellah & Associates Advocates v N K Brothers Limited [2014] eKLR** cited in the applicant's submissions stated the following:
- “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 judgment.”***
19. A similar reasoning was adopted by the court in the case of **Ndungu Githuka and Company Advocates v Geoffrey Moriaso Ole Mailoy [2019] eKLR** similarly quoted in the applicant's submissions, where it reasoned that in the absence of an order for variation or setting aside, a certificate of taxation is conclusive as to the sums ascertained to be owing.
20. Having already established that there is nothing to show that the certificate of taxation in the present instance has been challenged, this court has no other business save to enter judgment in accordance with the amount indicated in the certificate of taxation.
21. On the subject of interest, **Rule 7 of the Advocates (Remuneration) Order** provides as follows:

“An advocate may charge interest at 14% 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, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full.”

22. In the circumstances and in the absence of any contrary evidence, I am satisfied that the applicant herein is entitled to the sums taxed together with interest and I will allow the Motion dated 19th September, 2016 as prayed.

23. In the end this courts the following orders:

i. Judgment be and is hereby entered in favour of the applicant and against the respondent in the sum of Kshs.1,112,445.70.

ii. The advocate/applicant shall also have costs of the Motion dated 19th September, 2016.

iii. The Motion dated 5th October, 2016 is hereby dismissed with costs to the advocate/applicant.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF DECEMBER, 2021.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent