



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CORAM: A.K NDUNG'U J**

**CIVIL APPEAL NO 465 OF 2017**

**MERCY NDUTA MWANGI T/A MWANGI**

**KENG'ARA & CO. ADVOCATES.....APPELLANT**

**VERSUS**

**INVESCO ASSURANCE COMPANY LIMITED.....RESPONDENT**

*(Being an appeal from the judgment/ruling of Hon. E.K Usui – SPM dated 15<sup>th</sup> August 2017*

*in Chief Magistrate's Court at Milimani Commercial & Tax Court*

*at Nairobi Civil Case No. 8819 of 2016)*

**JUDGEMENT**

1. The appellant filed suit against the respondent at Chief Magistrate's Court Milimani being CMCC No. 8819 of 2016 (hereinafter the primary suit). The appellant's case in the primary suit was that the respondent retained her law firm to defend Milimani CMCC No. 1830 of 2005, Rahab Mugechi Wakahiu –vs- Daxir Manyi and Paul Kimani. The appellant in execution of the instructions filed a memorandum of appearance and defence on behalf of the respondent.
2. A bill of costs raised against the respondent was taxed on 24/11/2016 at Kshs. 107,466 and a certificate of taxation issued on 29/11/2016.
3. The appellant sued the respondent in Milimani CMCC 8819 of 2016 to enforce the payment of the taxed costs.
4. The respondent's defence to the claim was that it had already paid the legal fees payable for Nairobi CMCC 1830 of 2005 in accordance with a "global fees" agreement between the plaintiff and the defendant. It was averred that the respondent had paid the appellant a sum of Sh 20,018,336 in accordance with the "global scheme" arrangement and the plaintiff had failed to account for the same.
5. The defence elicited a Notice of Motion by the appellant dated 31/1/2017 brought under Order 2 Rule 15(1), (b)(c)(d) and 51(1) of the Civil Procedure Rules, Section 1B(1), Section 6, 7 and 3A of the Civil Procedure Act. The appellant sought orders for striking out of the defence dated 19/1/2017 and the entry of judgement as prayed for in the plaint in the sum of Kshs. 107,466 with interest thereon at the rate of 14% per annum with effect from 11/8/2016 until payment in full plus costs of the application and suit.
6. In a short ruling dated 15/8/2017, the learned trial magistrate dismissed the application at the second and third paragraphs of the ruling. She stated;

*"The defendant through its Legal Manager opposed the application. It is contended that the defence raises triable issues. That the parties had entered an agreement for global payment of fees and that the plaintiff was paid for the alleged services. Parties filed submissions and bundles of authorities which I have read. In the decided case TRANSEND MEDIA GROUP LTD –V- INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC)[2015]eKLR – it was held that the powers of striking out a pleading or suit should only be exercised after the court has considered all facts and not the merits of the case. DEV SURINDER KUMAR DJI –V- AGILITY LOGISTICS LTD [2013]eKLR "For a pleading to be dismissed pursuant to Order 2 Rule 15(1) it should be made clear and obvious that issues raised by the plaintiff can neither be substantiated nor disclose any reasonable or justifiable action against the defendant"(in this case vice-versa).*

*I have considered the defence herein. The nature of documents attached to this application and response thereto is a clear sign that the issues raised by both parties need to be investigated further in a full suit. The defendant raises triable issues. It has no merit. It is dismissed with costs to the defendant.”*

7. Aggrieved by this ruling the appellant has raised the following grounds of appeal;

1. *THAT the Learned Trial Magistrate erred in law and in principle in failing to strike out the statement of defence dated 19/1/2017 and enter judgment in favour of the appellant in the sum of Kshs. 107,466/= plus interest thereon at the rate of 14% per annum from 11/8/2016 until payment in full.*

2. *THAT the Learned Trial Magistrate erred in law and in fact in failing to award costs of the application and the suit to the appellant.*

3. *THAT the Learned Trial Magistrate erred in fact and in law in finding that the respondent's allegation of the existence of a global fees agreement of payment of the taxed Advocate/Client costs was a triable issue, whereas no documentary proof of the same was adduced before the trial court.*

4. *THAT the Learned Trial Magistrate erred in law and in principle in holding that there was a defence before court which raised triable issues, whereas all the issues raised in the defence were issues in previous litigation where they were held to be res judicata, namely:-*

1) *MILIMANI HC MISCELLANEOUS APPLICATION NO. 322 OF 2016*

*MWANGI KENG'ARA & CO. ADVOCATES VERSUS INVESCO ASSURANCE COMPANY LIMITED.*

2) *HIGH COURT CIVIL SUIT NO. 504 OF 2013 (Originating Summons)*

*INVESCO ASSURANCE COMPANY LIMITED VERSUS MERCY NDUTA MWANGI T/A MWANGI KENG'ARA & CO. ADVOCATES.*

3) *MILIMANI HC MISCELLANEOUS APPLICATION NO. 245 OF 2015*

*MWANGI KENG'ARA & CO. ADVOCATES VERSUS INVESCO ASSURANCE COMPANY LIMITED.*

5. *THAT the Learned Trial Magistrate erred in law and in principle in failing to find that a certificate of taxation having been issued in MILIMANI HC MISCELLANEOUS APPLICATION NO. 322 OF 2016 MWANGI KENG'ARA & CO. ADVOCATES VERSUS INVESCO ASSURANCE COMPANY LIMITED, there was no triable issue requiring a full trial, and thereby occasioned a great injustice to the appellant by dismissing the Notice of Motion dated 31/7/2017.*

6. *THAT the Learned Trial Magistrate erred in fact and in law, by entertaining the respondent's plea to avail oral evidence and documents in a full trial, whereas they had a chance to do so, during the hearing of the notice of motion dated 31/7/2017.*

7. *THAT the Learned Trial Magistrate gave no consideration whatsoever to the documentary evidence filed by the appellant, the pleadings and submissions, and previous High Court rulings touching on this matter and as a result delivered a biased and lop-sided ruling.*

8. *THAT the Learned Trial Magistrate's ruling defeats the overriding objectives of the law and the duty of the court, and is an impediment to justice.*

9. *THAT the learned Trial Magistrate erred in law and in principle in failing to find that the summary procedure was a legal means of obtaining judgment for a liquidated claim, without resorting to a full trial.*

10. *THAT the Learned Trial magistrate erred in law and in fact in dismissing the notice of motion dated 31/7/2017 with costs.*

**8.** It is sought that the entire ruling of the subordinate court delivered on 15/8/2017 be set aside and be substituted with an order striking out the defence dated 19/1/2017 and judgement be entered against the respondent in favour of the appellant in the sum of Kshs 107,466 plus interest at the rate of 14% per annum from 11/8/2016 until payment in full. It is further sought that costs of the Notice of Motion dated 31/1/2017 and the entire suit in CMCC 8819 of 2016 be awarded to the appellant.

**9.** The appeal was disposed off by way of written submissions where they submitted as follows; the appellant argued that in the bill of costs dated 24<sup>th</sup> June 2016, due credit was given to a sum of Kshs. 12,000/= which had been paid by the respondent for representation in CMCC No. 1830 of 2005. Counsel submitted that if it was indeed true that the respondent had paid all legal fees, the proper forum to challenge the certificate of taxation was before the taxing officer. The respondent had in fact filed an application seeking to stop the taxation on the grounds that a sum of Kshs. 17,013,237/= had allegedly been paid but the application was not successful.

**10.** The appellant pointed out that despite claiming that the colossal sum of Kshs. 20,018,336/= had been paid, no counter claim or set off had been filed with respect to the monies.

11. The appellant submitted that the respondent had sought to impeach the global fee agreement dated 19<sup>th</sup> October 2006 and bar taxation of the appellant's costs in 300 matters including CMCC 1830 of 2005 in ***Invesco Assurance Company Limited versus Mercy Nduta Mwangi t/a Mwangi Keng'ara & Co. Advocates HCCC No. 504 of 2013*** but the court had dismissed that application and held;

*"I do not agree with the plaintiff's argument that the said agreement should be nullified noting that the defendant relied on the same to continue rendering services to the plaintiff whilst relying on the safeguard as stated in the agreement."*

12. Adopting that decision, the court in ***Mwangi Keng'ara & Co. Advocates versus INVESCO Assurance Company Limited HC Miscellaneous Application No. 245 of 2015*** held that;

*"Unless that decision was set aside or reversed, it remains firmly in place. Therefore, the position is that the court recognizes the existence of an agreement between the Advocate and the Client. This court cannot be called upon to adjudicate on that issue as it was already determined by a judge of concurrent jurisdiction."*

13. On the issue of the payments allegedly made by the respondent it is submitted that the court in the case of ***Mwangi Keng'ara & Co. Advocates versus Invesco Assurance Company Limited HC Miscellaneous Application No. 51 of 2015*** observed thus;

*"As noted in all cases involving the Client and Advocate herein, the issue had been about the Client's claim that a sum of Kshs. 20 million had been paid to the Advocate which is denied by the Advocate. The Client had been using the issue of the kshs. 20 million to seek orders of stay but which were rejected by the courts and the Client directed to file suit for taking of accounts. The issue of the payment of Kshs. 20 million by the Client to the Advocate as a ground for stay appears to have been substantially determined by the various courts. Hence the Client now raising the same is barred and/or stopped by the doctrine of Res judicata. It is my finding that the Client's application herein is Res judicata."*

14. Similarly, in ***Mercy Nduta Mwangi t/a Mwangi Keng'ara & Co. Advocates versus INVESCO Assurance Company Limited HCCA No. 110 of 2016***, the court held;

*"The issue of deposit was clearly unarguable in light of the said decisions. It had no foundation as its foundation had been removed by the doctrine of res judicata; it had no chance of succeeding; it was therefore brought merely for purposes of annoyance for some fanciful advantage; and it could certainly lead to no good."*

15. Further, the appellant submits that whereas **section 45** of the **Advocates Act** provides that there can be no taxation where there is an agreement such an objection can only be raised prior to the taxation. The appellant relies on the case of ***Ahmednasir Abdikadir & Company Advocates vs National Bank Kenya Limited [2006]eKLR*** where the court held;

*"If it believed (client) that no fees were due to the advocates on the basis of an agreement between it and the advocates, it could have filed a suit for a declaration to that effect even before the said bill was taxed. It could have sought stay orders in the suit."*

16. The appellant also contends that since the respondent had not denied the retainer, the certificate of taxation was final. To buttress this view, the appellant relied on **section 51(2)** of the **Advocates Act** and the case of ***Invesco Assurance Co. Limited vs J.G Kariuki t/a Gachiri Kariuki & Co. Advocates [2013]eKLR***, where the court held;

*"I am of the view that even if the applicant had indeed entered into such agreement that cannot be used against them to deny them their rightful dues as per certificate of taxation. I therefore find no merit in the respondent's argument... the only issue that the court would consider when application such as the present one is before the court is whether there is in existence a certificate of taxation and whether or not there is a dispute on retainer."*

17. In ***Lubullellah and Associates Advocates vs N.K brothers Limited [2014]eKLR Misc. Application No. 52 of 2012*** the court held;

*"The Law is very clear that once a taxing master has taxed the costs and issued a certificate of the costs and there is no reference against this 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 in favour of the applicant against the respondent herein of the taxed sum indicated in the Certificate of Taxation that was issued on 25<sup>th</sup> November 2012."*

18. It was for these reasons that the appellant urged the court to dismiss the respondent's defence and enter judgement in her favour.

19. The respondent on the other hand argues that the appellant seeks to unjustly enrich herself as she has already been paid her legal fees. The respondent relied on the case of ***Moronge & Company Advocates vs Kenya Railways Authority Civil Appeal No. 262 of 2012*** where the court held that the advocate's pay must be commensurate to the work done otherwise it is deemed to be unjust enrichment. It is argued that the respondent raised triable issues in its defence and dismissing it will amount to a miscarriage of justice.

## **DETERMINATION**

20. The main issue commending itself for determination in this appeal is whether the respondent's statement of defence dated 19<sup>th</sup> January 2017 ought to be struck out. **Order 2 Rule 15(1)** of the **Civil Procedure Rules** provides for striking out of pleadings as follows:

15.(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgement to be entered accordingly, as the case may be.

21. In *Margaret Njeri Mbugua vs Kirk Mweya Nyaga Civil Appeal No. 110 of 2012 [2016] eKLR* the Court of Appeal after an elaborate discourse on the circumstances under which the foregoing provision (formerly Order VI Rule 13) may be applied, held that a mere denial or general traverse is not sufficient in an action for a debt.

22. It is however trite that the power to strike out pleadings should be exercised only after the court has considered all the facts. Where the defendant raises even one bona fide triable issue, he should be allowed to defend the case in trial. In *Job Kilach Vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono Civil Appeal No. 94 of 2006 [2015]eKLR* the Court of Appeal defined a triable issue thus;

*What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, "subject or liable to judicial examination and trial". It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.*

23. The main issue brought out in the impugned statement of defence, was that the respondent had paid the appellant a sum of Kshs. 20,018,336/= as agreed in an agreement dated 19<sup>th</sup> October 2016 dubbed global fees agreement. In its list of documents, the defendant annexed the agreement, schedules and vouchers of payment to the appellant and the court's ruling in HCCC No. 504 of 2013 (supra).

24. The courts in *HCCC No. 504 of 2013* and *HC Miscellaneous Application No. 245 of 2015 (supra)* held that the agreement dated 19<sup>th</sup> October 2016 was binding between the parties. Clause 4(a) thereof stipulated that other than matters where bills of costs were pending, the basic legal fees for three hundred cases in the appellant's conduct was Kshs. 39,320/=. The agreement stated that a total of Kshs. 3,572,821/= had been paid to the appellant and the balance of Kshs. 8,223,179/= less withholding tax would be remitted to the appellant.

25. When the appellant filed her bill of costs dated 24<sup>th</sup> June 2016 in *Miscellaneous Application No. 322 of 2016*, the respondent opposed it by an application dated 5<sup>th</sup> September 2016. Its former legal manager, Paul Gichuhi, averred that the appellant had been paid a sum of Kshs. 17,013,237/= in respect of 300 files including *CMCC No. 1830 of 2005*. It was also argued that the bill of costs contravened **section 45 (6)** of the **Advocates Act** which stipulates;

*45 (6) Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48.*

26. In as much as the taxing master's decision on the respondent's application dated 5<sup>th</sup> September 2016 has not been availed to the court, it can be assumed that the application was dismissed, given that the bill of costs was taxed at Kshs. 107,466/= and a certificate of taxation issued on 29<sup>th</sup> November 2016. There is no claim that a reference was preferred or that the certificate of taxation was varied.

27. **Section 51** of the **Advocates Act** provides;

*51(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.*

28. I concur with the persuasive authority of *Owino Okeyo and Company versus Fuelex Kenya Limited Misc App No. 382 of 2004 [2005]eKLR* where the court held as follows regarding **Section 51(2)** of the **Advocates Act**;

*"That section has many parts to it. First it attests to the finality of a certificate of taxation which had not been set aside or altered by the court. Secondly, it confirms that the sum so certified is deemed to be due. And finally, it states that the advocate was entitled to judgment in the taxed costs provided only that the retainer was not disputed."*

29. It is also noteworthy that the respondent did not adduce proof of payment of the appellant's legal fees. Before the taxing master, the respondent deposed that its documents had been lost when its operational departments were raided by auctioneers following a legal moratorium placed on it on 29<sup>th</sup> February 2008. Despite the respondent's claim that it had sought a comprehensive schedule of payments from the bank none has been forthcoming so far. The global fee agreement stated that a total of Kshs. 3,572,821/= had been paid for 300 files in the appellant's conduct. The appellant acknowledged payment of a deposit of Kshs. 12,000/= by the respondent in her bill of costs.

30. It is therefore my considered view that the appellant was entitled to the remainder of her legal fees as taxed and certified by the taxing master. The respondent did not contest retaining the appellant to represent its interest in **CMCC No. 1830 of 2005** and from the foregoing, it is clear that the claim that it had purportedly paid the appellant was unsubstantiated.

31. In **Magunga General Stores v Pepco Distributors Ltd [1986-89] EA 334** the Court held;

*A mere denial is not a sufficient defence and a defendant has to show either by affidavit, oral evidence, or otherwise, that there is a good defence.*

32. Had the trial court considered the facts and the authorities cited it would have come to the conclusion as I have, that the issues raised by the respondent in its statement of defence were not bona fide. The issue of the alleged payments had already been dealt with by superior courts and the doctrine of stare decisis required the trial court to be bound by those decisions. I therefore find that the appellant had made out a case for striking out of the defence.

33. Since the certificate of taxation dated 29<sup>th</sup> November 2016 was not disputed, I find that the appellant was entitled to the sum of Kshs. 107,466/=.

34. On the claim for interest, the appellant submits that she notified the respondent of her intention to seek interest at the rate of 14% per annum. It is contended that the appellant has been kept away from her fees since 24<sup>th</sup> June 2016 and it is only fair that interest be granted as prayed.

35. The appellant's claim for interest is based on **Rule 7 of the Advocates (Remuneration) Order** which provides:

*"An advocate may charge interest at 14 per cent 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 is raised before the amount of the bill has been paid or tendered in full."*

36. The notice to charge an interest on costs was set out at the foot of the bill of costs which was received by the respondent on 11<sup>th</sup> August, 2016. I therefore find that the appellant was entitled to interest at 14% per annum from 11<sup>th</sup> September 2016 one month after receipt of the bill of costs by the respondent.

37. In conclusion, I find this appeal merited and allow it in the following terms;

- a. The entire ruling of the subordinate court delivered on 15<sup>th</sup> August 2017 is set aside and is substituted with an order striking out the defence dated 19<sup>th</sup> January 2017;
- b. Judgment is entered in favour of the appellant in the sum of Kshs. 107,466/= plus interest at the rate of 14% per annum from 11<sup>th</sup> September 2016 until payment in full;
- c. The costs of this appeal is awarded to the appellant.

**Dated, Signed and Delivered at Nairobi this 20<sup>th</sup> day of January, 2020.**

**A.K NDUNG'U**

**JUDGE**