



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MISC. APPLICATION NO. 374 OF 2013

PETER GICHUKI KING'ARA

t/a GICHUKI KING'ARA ADVOCATES.....APPLICANT

VERSUS

SARBJIT SINGH RAI.....RESPONDENT

RULING

1. For determination is the Notice of motion of 22nd June 2018 for the following orders:-

(a) That Summary judgment be entered against the Defendant in favour of the Plaintiff in **terms of the Certificate of Cost issued on 20th June 2018 by Deputy Registrar S.A. Opande in Milimani Commercial Tax & Admiralty Division High Court Miscellaneous Application No. 374 of 2013 in the sum of Kshs. 226,409/-.**

(b) That the costs of the application and the suit be awarded to the Plaintiff/Applicant.

2. This matter is in respect to an Advocate and Client Bill of Costs which was taxed by Hon. C. Wanyama, Deputy Registrar on 3rd May 2018. The Advocates Bill was taxed at Kshs. 226,409/=. Subsequently, a Certificate of Costs dated 25th June 2018 was issued for the said amount. The Advocate now seeks the entry of Judgment for that sum in summary fashion.

3. Although the Advocate cites many provisions of the Civil Procedure Rules and paragraph 7 of the Advocates Remuneration Order as providing anchor for his plea, the real home for an application of this nature is Section 51(2) of the Advocates Act which provides;-

“(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”.

4. Notwithstanding absence during the hearing of the motion, Counsel for the client had filed Grounds of opposition which this court is obliged to consider. These are:

(a) This Honourable Court has no jurisdiction in these proceedings whether under the provisions cited or at all to enter summary judgment either as sought in the said application or at all.

(b) The Respondent does not owe any fees to the Applicant as sought or at all on this matter relating to services provided in the Court of Appeal.

(c) The said application is frivolous, vexatious or otherwise an abuse of the process of this Honourable Court.

5. As the issue of jurisdiction of this Court is raised, the Court is duty bound to determine it in *limine*. Whilst this Court did not have the benefit of an elaboration as to the precise issue in respect to jurisdiction that is raised, the Court is able to glean its nature from the past stance taken by client.

6. In a Notice of Motion dated 6th October 2013 in which the client had sought the striking out of the Advocates Bill of Costs (which is the

subject of these proceedings), the client argued that this Honourable Court has no jurisdiction to entertain and/or tax the said Bill of Costs as the alleged services arose in the Court of Appeal. Yet the Advocate seeks fees for defending the client before the Court of Appeal in Civil Application No. 307 of 2003. The proceedings were in respect to stay of proceedings pending an appeal. The fees sought are indeed for remuneration for work alleged done before the Court of Appeal.

7. The question that begs is how and in what forum a dispute in respect to Advocate/Client fees for services provided before the Court of Appeal should be resolved? The answer seems to be in Rule 108 (at the material time but now Rule (111)) of the Court of Appeal Rules. For good measure the entire Rule needs to be set out it reads:-

“108. (1) The Registrar shall be a taxing officer with power to tax the costs as between party and party of or arising out of any application or appeal to the Court.

(2) Such costs shall be taxed in accordance with the rules and scale set out in the Third schedule.

(3) The remuneration of an advocate by his client in respect of application or appeal shall be governed by the rules and scales to proceedings in the High Court”.

8. Unlike in the case of Party and Party costs, where the Taxing officer is the Registrar of the Court of Appeal (sub rule 1), Subrule 3 is clear that remuneration of an Advocate by a client is governed by the rules and Scales to proceedings in the High Court. This Court takes rules to include rules of procedure and forum. If the intention was that advocate/client fees be taxed by the Registrar of the Court of Appeal, then the rules would have explicitly said so as in subrule 1 in respect to Party and Party costs. Being of that view, I hold that this Court has jurisdiction to hear and determine the motion before it.

9. Back to the heart of the matter! The provisions of Section 51(2) of the Advocates Act bear no ambiguity. Once a Taxing master has issued a Certificate of costs which has not been set aside or altered by Court, then it is final as to the amount of costs in respect to the certificate and judgment can be entered for the sum certified. A rider being that the Court may refuse to enter judgment if:-

(i) There is a dispute on retainer; or

(ii) “Where it appears to Court that issues have been raised that ought to be investigated and ventilated in a proper trial, even if there is no dispute as to retainer” (see Hon. Waweru J. in Meenye and Kirima Advocates vs Kenya Commercial Bank Limited).

10. In the matter before Court, the Deputy Registrar has issued a certificate of costs dated 20th June 2018 certifying that the fees due to the Advocate from the Client is Kshs. 226,409/=. That certificate has neither been set aside nor altered.

11. In the Grounds of Opposition, the Client does not challenge retainer. If however it can be construed that ground 2 which reads “*The Respondent does not owe any fees to the Applicant as sought or at all in this matter relating to services provided in the Court of Appeal*” reveals a challenge on retainer, then the Client has not done enough. Whether or not there exists a retainer is a question of fact. A client disputing retainer ought to provide affidavit evidence to support that contention. None was done here. I hold that Retainer is not disputed.

12. In addition, the grounds of opposition do not raise grounds that call for further investigation or interrogation in respect to the Bill of Costs.

13. Satisfied that the Advocate has met the imperatives of Section 51(2) of the Advocates Act, I allow the application of 22nd June 2018 as prayed.

Dated, Signed and Delivered in Court at Nairobi this 8th day of February, 2019.

F. TUIYOTT

JUDGE

Present:

Okutha h/b for Amollo for Respondent

Mungai for King'ara for Applicant

Nixon- Court Assistant