



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 868 OF 2009

JAMES GITAU SINGH T/A

SINGH GITAU ADVOCATESPLAINTIFF

-VERSUS-

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

J U D G M E N T

1. This suit was filed by James Gitau Singh trading as Singh Gitau & Co. Advocates, who shall hereinafter be referred to as Mr. Singh. Mr. Singh sought judgment against National Bank of Kenya Limited (herein after referred to as NBK) for Kshs. 14,068,148.26, plus interest on that amount from 4th February 2009. Mr. Singh also sought costs of the suit.

BACKGROUND

2. It is admitted by both parties that NBK instructed Mr. Singh in 2003 to make recovery on its behalf, against its debtor Mbo-I-Kamiti Farmers Company Limited, of Kshs. 87,706,350.50 with interest at Kshs. 26% per annum and Kshs. 45,620,130.40 with interest at 29% per annum.

3. It is further admitted by the parties that Mr. Singh filed a suit being Nairobi HCCC 288 of 2003, on behalf of NBK against Mbo-I-Kamiti Farmers Co. Ltd.

4. The Advocate/Client relationship between Mr. Singh and NBK broke down. Mr. Singh's costs were taxed against NBK by the taxing master, on 4th February 2009, at Kshs. 14,068,148.26. These are the costs that Mr. Singh sought to recover against NBK in this suit.

5. It is admitted by the parties that those costs were paid by NBK to Mr. Singh by letter dated 11th January but received by Mr. Singh on 12th January 2010. The only issues that remain for determination by this Court are:

- i. *Whether Mr. Singh is entitled to interest on that amount paid; and*
- ii. *Whether Mr. Singh is entitled to costs of this suit.*

CONSENT ORDER

6. When this matter came before Court on 28th May 2018, parties recorded a consent by which they agreed that this suit be disposed by way of written submissions for the determination of two issues, namely:

- i. *Whether interest is payable on the taxed amount of Kshs. 14,068,148.26 and*
- ii. *Whether the Plaintiff (Mr. Singh) is entitled to the costs of the suit.*

7. Although parties did not specifically state, in their consent, that they would rely on their witness statements they both however relied on their respective witness statements, and bundle of documents.

NBK'S SUBMISSIONS ON FIRST ISSUE

8. On the first issue, contained in the parties consent, NBK submitted that Mr. Singh had failed to issue to NBK a 'Statutory Notice' as required under paragraph 7 of the Advocates (Remuneration) Order.

9. That paragraph 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, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.”

10. It will be noted that under that paragraph an Advocate is only entitled to claim interest at 14% per annum if one month of delivery of his bill to the Client such a bill is not paid. That delivery of the bill to the Client I presume is what NBK wrongly referred to as 'Statutory Notice.'

11. NBK in respect to the first issue also submitted that interest was not recoverable because it was not allowed by the taxing master and that being so Section 51(2) of the Advocates act, Cap. 16, did not permit the Court to award interest. Section 51 (2) of Cap. 16 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.”

12. NBK also objected to the award of interest on the basis that there was no inordinate delay by NBK to settle the taxed costs and that NBK's lawyer had spoken to Mr. Singh and promised to make payment of the taxed costs

MR. SINGH SUBMISSIONS ON FIRST ISSUE

13. In response to the submission that there was promise to settle those taxed costs Mr. Singh denied that such a promise was made to him. He further submitted that payment that was made by NBK was prompted by the filing of this suit.

14. On whether notice of the bills was given to NBK. Mr. Singh submitted that after taxation of his costs, on 4th February 2009, he, by letter dated 17th February and 7th April 2009, made demand for the settlement of those costs but that settlement was only made in January 2010, after the summons and Plaintiff of this suit were served on NBK.

15. Mr. Singh relied on the provisions of paragraph 7 of the Advocates (Remuneration) Order (hereafter referred to as the Remuneration Order) and submitted that he was entitled to 14% per annum interest on the taxed costs as prayed.

ANALYSIS AND DETERMINATION OF FIRST ISSUE

16. The first issue, it will be recalled, requires this Court to determine whether Mr. Singh is entitled to interest as provided under paragraph 7 of the Remuneration Order.

17. NBK relied on the provisions of Section 51 (2) of Cap. 16. That Section provides that a Certificate of Taxation contains the final amount of costs recoverable. In other words unless that Certificate of Taxation is set aside or altered the Court is bound to only enter judgment of the taxed amount.

18. In this case, Mr. Singh does not seek to have his cost set aside or altered. Indeed it is clear he accepts that the costs he was entitled to claim against NBK were the costs that were taxed on 4th February 2009. What Mr. Singh seeks, and it is clear in this claim, is interest on the taxed costs. When one appreciates that, that, is the claim before Court it becomes clear that Section 51 (2) of Cap. 16 has no relevance to this matter. That submission, therefore, by NBK on that Section is misconceived and rejected.

19. NBK also argued that Mr. Singh was not entitled to claim interest because he had failed to deliver his bill to NBK as required under paragraph 7 of the Remuneration Order.

20. Consideration the documents before Court there is no basis for the submissions by NBK.

21. By letter dated 4th August 2003 Mr. Singh sent his Bill of Costs for Kshs. 13,140,525 for settlement by NBK. That notice of the bill was more than a month from the date of filing of this suit, that is 27th November 2009. Mr. Singh more than satisfied the requirements of paragraph 7 of the Remuneration Order.

22. NBK's argument that there was no inordinate delay in making payment of the taxed costs which it did on 12th January 2010 is not an answer to the strict provision of paragraph 7 of the Remuneration Order. The fact is that that paragraph provides that interest is applicable within one month of the delivery of the Bill of Costs. It is pertinent to note that Mr. Singh made demand of settlement of his bill more than once. The fact that NBK had a pending reference against the taxation was not reason to withhold settlement of the taxed costs. That reference was in any case found to have no merit by the Court's ruling of 6th November 2009.

23. NBK submitted that it had promised to make payment of taxed costs when this suit was filed. That contention was denied by Mr. Singh.

24. Parties having consented to proceed in this matter by way of written submissions this Court would then be hard pressed to decide on a disputed matter, having not seen witnesses testify to be able to determine their demeanour. Accordingly I shall not determine whether or not there was a promise to settle the costs and whether such a promise had any bearing on the determination of payment of interest on the taxed costs or not.

25. In the end having considered the parties written submissions, their documents and witness statements, I make a finding interest on the taxed costs, as provided under paragraph 7 of the Remuneration Order is payable to James Gitau Singh t/a Singh Gitau & Co. Advocates.

NBK'S SUBMISSIONS ON THE SECOND ISSUE

26. The main contention, of NBK, in support of the second issue is that Mr. Singh filed this action prior to giving notice to sue as provided under paragraph 53 of the Remuneration Order. That paragraph provides:-

“If the Plaintiff in any action has not given the defendant notice of his intention to sue, and the defendant pays the amount claimed or found due at or before the first hearing no Advocate’s costs shall be allowed except on a special Order of the judge or magistrate.”

27. NBK in advancing its submissions reiterated that it paid the principal of the taxed costs in January 2010, before the first hearing of this action. In this respect NBK relied on the case **CATHERINE NGORE OBARE V STEPHEN MULATYA KULA [2014] eKLR** where Justice M. J. Aanyara Emukule had this to say:

“The basis of denial of costs for failure to give notice to sue is founded on the principle that where the claim is for liquidated damages, it is considered that had the defendant been notified of the debt due, he would have paid, and the necessity of suit would have been avoided. The principle also applies where through suit has been filed, the defendant pays the claim well before the hearing of the suit.”

28. NBK further submitted that Mr. Singh does not deserve costs because of misconduct. NBK alleged, through its submissions since it was not proved, that Mr. Singh prepared his pleading in this matter in the name of Mukite Musangi & Co. Advocates. NBK submitted that Mukite Musangi practices law under the firm LJA Associates with Mr. Singh along other partners in that firm.

MR. SINGH'S SUBMISSIONS TO THE SECOND ISSUE

29. Mr. Singh submitted that it is not in every case that notice before filing suit should be given. He relied on the case **STANLEY KAUNGA NKARICHIA V MERU TEACHERS COLLEGE & ANOTHER [2016] eKLR** viz:

“It has never been the law that a defendant should always have notice of intention to bring suit against him before action is filed in Court. There are cases which, by their very nature or due to obtaining circumstances, it is impractical to issue a notice of intention to sue or issuing such notice of intention to sue will only be to the detriment of the interest of the Plaintiff and justice...”

Absence of or failure to issue notice of intention to file suit is just one of the considerations that the Court must take into account in awarding costs. If a Court makes it the sole determinant factor, then the said Court must give good reason to deny the successful party his costs...

As a matter of general principle, costs follow the event and the successful party will always have costs of his success unless the Court has good reason to Order otherwise...

The mere fact that a demand may not have been issued – is not alone a good reason to deny a successful party his costs of the suit.”

ANALYSIS AND DETERMINATION OF THE SECOND ISSUE

30. On the second issue, the Court will determine whether Mr. Singh is entitled to claim costs of this suit.

31. It will be recalled that I previously stated that this suit was filed on 27th November 2009. NBK by letter dated 11th January 2010 forwarded a cheque for Kshs. 14,068,148.25 to the firm of Singh Gitau Advocates. That cheque was payment of the principal sum, less costs and interest, claimed in this action. That payment of the principle sum was before the first hearing was scheduled in this action.

32. In view of the above can it can be said that Mr. Singh was dis-entitled to his Advocate’s costs as provided in paragraph 53 of the Remuneration Order.

33. My answer is an emphatic – no. This is because Mr. Singh by letter dated 4th August 2003 sent his bill to NBK claiming Kshs. 13,140,525.00. Further and after taxation of his costs Mr. Singh made a demand to NBK, by his letter dated 17th February 2009 addressed to NBK’s Advocate in the following terms:

“We refer to the above matter which our Bill of Costs was taxed at Kshs. 13,998,298.26. Please request our mutual Client to settle this amount within the next seven (7) days failing, which we shall file an enforcement suit.”

34. There is no legal obligation, that I can find where a party is required to give more than one notice before filing suit. The notices given by Mr. Singh sufficiently satisfied paragraph 53 of the Remuneration Order.

35. Further, I wholly agree with the holding in the case **Stanley Kaunga (Supra)** that the mere fact that a demand before filing suit had not been issued is not alone a good reason to deny a successful party his costs of the suit.

36. It is also important to note the paragraph 53 of the Remuneration is subsidiary legislation, whereas Section 27 of the Civil Procedure Act Cap. 2 an Act of Parliament gives the Court discretion on the determination of which party pays fees. Section 31 of the Interpretation and General Provision Act provides under Section 31 (b) provides:

“No subsidiary legislation shall be inconsistent with the provisions of an Act.”

37. To the extent that any provision in the Remuneration Order contradicts Section 27 of Cap. 21 it cannot stand.

38. The issue raised by NBK that the Advocate who filed this case, Mukite Musangi, is in a partnership, namely LJA Associates, with James Singh is a none issue. It is a none issue because NBK instructed a law firm entitled Singh Gitau & Advocates to at for it. It is that law firm that is entitled to the costs and not LJA Associate Advocates. This is clear from the cheque which NBK sent to settle the principal costs – it was made out to Singh Gitau & Co. Advocates. That cheque, as evidenced by the documents before Court, was banked into the account of Singh Gitau & Co. Advocates. It follows therefore that it matters not that Mr. Singh is now represented by a law firm LJA Associates Advocates, where Mr. Singh is now a partner. What matters is that that law firm LJA Associates Advocates is a different law firm to sign Gitau & co. Advocates, the firm that is the Plaintiff in this case.

39. The second issue, therefore, is determined in favour of Mr. Singh.

40. In conclusion therefore, the judgment of this Court is as follows:

a) The Plaintiff is granted judgment for interest at 14% per annum on the principal sum of Kshs. 14,068,148.26 from 4th February 2009 until payment in full.

b) The Plaintiff is awarded costs of this suit.

DATED, SIGNED and DELIVERED at NAIROBI this 8TH day of MAY, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

.....FOR THE PLAINTIFF

.....FOR THE DEFENDANT