



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 704 OF 2016**

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

**- V E R S U S -**

**INVESCO INSURANCE COMPANY LIMITED.....RESPONDENT**

*(Being an appeal from the ruling of Chief Magistrate's Court at Nairobi delivered by Hon. Grace M'masi (Ms) SPM on 4<sup>th</sup> November 2016 in CMCC No. 760 of 2016)*

**JUDGEMENT**

1) The appellant herein, filed a plaint against the respondent claiming payment of fees which were taxed at ksh.42,589/= on 28.8.2006 plus interest. The respondent filed a defence to deny the appellant's claim stating that the appellant had been fully paid. The appellant filed the application dated 14.3.2016 in which he sought for summary judgment against the respondent. The respondent in turn opposed the motion. Hon. Grace Mmasi, the learned Chief Magistrate heard and eventually dismissed the motion.

2) The appellant being aggrieved by the aforesaid decision, preferred this appeal and put forward the following grounds:

***1. THAT the learned trial magistrate erred in fact and in law in failing to find, that the date when taxation of the Advocate/Client bill of costs took place was not in dispute in the suit herein, and hence the computation of the limitation period did not require a full trial for its determination.***

***2. THAT the learned trial magistrate erred in fact and in law in finding that the Advocate/Client costs having been taxed on 28/8/2006, raised a triable issue under the Limitation of Actions Act, Chapter 4, that could only be determined through a full trial.***

***3. THAT the Learned Trial Magistrate erred in fact and in law, by failing to find that the taxation of the plaintiff's costs having been done by consent, there was no defence to the claim before the court.***

***4. THAT the Learned Trial Magistrate erred in fact and in law, by failing to find that the defence of an agreement of fees which had expressly excluded the certificate of taxation in HIGH COURT MISCELLANEOUS APPLICATION NO. 771 OF 2006, MERCY NDUTA MWANGI T/A MWANGI KENG'ARA & CO. ADVOCATES VS INVESCO ASSURANCE COMPANY LIMITED, could not lie and hence was scandalous and an abuse of the court process.***

***5. THAT the learned trial magistrate erred in fact and in law by failing to find that the High Court Rulings in***

***HIGH COURT CIVIL CASE NO. 504 OF 2013 MERCY NDUTA MWANGI T/A MWANGI KENG'ARA & CO. ADVOCATES VERSUS INVESCO ASSURANCE COMPANY LIMITED.***

***rendered the issue of the Agreement of fees res judicata, and tripped off the trial court, of jurisdiction to entertain litigation touching on the said agreement.***

***6. THAT the learned trial magistrate erred in fact and in law in failing to fully evaluate the pleadings, evidence, submissions and case law filed by the appellant, whereby the court misdirected itself and arrived at a wholly unjust decision.***

***7. THAT the learned trial magistrate erred in fact and in law in failing to strike out the defence for being frivolous, vexatious and an abuse of the court process and in failing to enter judgment in terms of the plaint filed herein.***

***8. THAT the learned trial magistrate erred in fact and in law in failing to award interest from the date of taxation until payment in full.***

**9. THAT the learned trial magistrate erred in fact and in law in ordering a full trial, when there was no evidence before the court challenging the appellant's claim.**

**10. THAT the learned Trial Magistrate erred in fact and in law in failing to award costs of the suit to the appellant.**

3) When this appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the arguments which were made before the trial court and further considered the rival written submissions.

4) Though the appellant put forward a total of ten (10) grounds of appeal, the main issue which commends itself for determination is whether or not the trial Chief magistrate should have struck out the respondent's defence and enter summary judgment in favour of the appellant.

5) It is the submission of the appellant that the appellant and the respondent had entered into the agreement dated 19.10.2006 in which at clause 4(a) it expressly excluded matters where bills of costs were already filed in court and or taxed.

6) The appellant further pointed out that the certificate of taxation which is the cause of action herein was issued on 11.10.2006 prior to the execution of the agreement and is therefore expressly excluded by the agreement hence it is the appellant's submission that paragraphs 13 and 23 in which the respondent raised the defence of an agreement on fees are scandalous and misconceived.

7) The appellant further argued that Section 45(6) of the Advocates Act provides that there can be no taxation where there is an agreement under Section 45 thereof. This court was urged to find that the respondent is mischievous in asking this court to enforce an agreement it sought to impeach in H.C.C.C. no 504 of 2013 (O.S) in which the respondent stated **inter alia** that "*The plaintiff has come across an agreement dated 19.10.2006 purported to have been entered into with the defendant which agreement is harsh and unconscionable and ought to set aside.*" In a nutshell the appellant is of the argument that the issue touching on the agreement on fees had been previously been litigated in Nairobi H.C.C.C. no. 14 of 2013 where the respondent's claims had been dismissed.

8) The appellant also argued that the defence filed by the respondent is vexatious, frivolous and is meant to delay the fair conclusion of this matter.

9) The appellant further argued that it is an abuse of the court process to advance contradictory positions on the same issue before two different courts and seek to litigate a matter that has been dealt with by another court. It was pointed out that Lady Justice Ougo dismissed the prayer for accounting for alleged payment of ksh.20,000,000/= in her ruling delivered on 26.9.2014 vide H.C.C.C no. 504 of 2013 (O.S). It was also argued that since there was evidence of the variation or setting aside of the certificate of taxation, the same is final under Section 51(2) of the Advocates Act.

10) The respondent on the other hand vehemently opposed the grounds advanced by the appellant. It is the submission of the respondent that the matter was not straight forward for the court to enter summary judgment. It is argued that there is need to present evidence to establish proof of payment of legal fees and therefore it was prejudicial to the respondent if the trial court entered summary judgment without considering the respondent's defence. The respondent pinpointed out that the appellant seeks to unjustly enrich himself as the monies she claims have already been paid.

11) Having considered the rival submissions plus the authorities cited by the parties, it is apparent that the issue is whether or not this suit before the trial should be summarily be determined or it should be determined via a trial.

12) In the case of **ICDC vs= Daber Enterprises Ltd (2000) 1E.A 75**, the court stated *inter alia*

**"That summary judgment can only be entered where the matter is plain and obvious....."**

13) In the dispute before the trial court, the learned Chief Magistrate, stated that she had perused the defence and found that the same raises triable issues.

14) One of the issues which was identified is whether the certificate of taxation was time barred. There is no dispute that the question as to whether or not the appellant was fully paid his legal fees is a contentious issue. The issue can only be settled in a trial where the evidence both oral and documentary will be interrogated by cross-examination. With respect, I cannot fault the manner the learned Chief Magistrate dealt with the motion.

15) In the end, I find no merit in this appeal. The same is dismissed in its entirety with costs to the respondent.

**Dated, Signed and Delivered in open court this 2<sup>nd</sup> day of May, 2019.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent