



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 320 OF 2016

MERCY NDUTA MWANGI.....APPELLANT

T/a MWANGI KENGARA & COMPANY ADVOCATE

VERSUS

INVESCO ASSURANCE COMPANY LIMITED.....RESPONDENT

(Being an appeal from the Ruling delivered on 14th June, 2016 by Hon. L. P. Kassan (Mr.) (Senior Principal Magistrate) Chief Magistrate's Court at Nairobi in CMCC No. 2695 of 2015).

JUDGMENT

1. Vide a plaint (amended) dated 2nd July, 2015, the Appellant, an Advocate of the High Court of Kenya trading in the name of Mwangi Kengara & Co. Advocates sued the Respondent, Invesco Assurance Company Ltd in the lower court for the sum of Ksh.145,788/= plus interest at Ksh.14% per annum from 20th June, 2014 until payment in full.

2. It was pleaded that the Appellant represented the Respondent in Machakos CMCC 856 of 2004 Kiluva Kimuyu v Peter Mwau Muinde and that the Respondent failed to settle the Appellant's fees. That subsequently the contested Bill of costs was taxed in HC Mks Misc. Appl. 119 of 2014 Mwangi Kengara & Co. Advocates v Invesco Assurance Co. Ltd at Ksh.145,788/=.

3. The claim was denied as per the statement of defence dated 25th June, 2015. The Respondent admitted having been represented by the Appellant in HC Mks CMCC No. 856/2004 and averred that it had paid the legal fees as per the "global fees" agreement reached between the parties as opposed to payment of the fees on a file by file basis. The Respondent further averred that it had paid the Appellant the sum of Ksh.20,018,336/= in accordance with the "global fees" agreement and stated that the Appellant had failed to account for the said payment.

4. In a reply to the defence, the Appellant protested the filing of the defence without the leave of the court and prayed for the striking out of the same. The contents of the plaint were reiterated and it was averred that the taking of accounts was sought by the Respondent in HCCC No. 503/13 (Originating Summons) Invesco Assurance Co. Ltd v Mercy Nduta Mwangi T/a Mwangi Kengara & Co Advocates which is still pending determination and is therefore *sub judice*. That the accounting for fees was done by the Taxing Master in HCCC Mks Misc. Appl. No. 119/2014 Mwangi Kengara & Co Advocate v Invesco Assurance Co. Ltd and the same is *res judicata* as the certificate of taxation has been issued.

5. Subsequent to the filing of the suit, the Appellant filed the Notice of Motion dated 16th June, 2015 seeking the following orders:

"1. That this application be heard and determined before the Defendant enters a defence herein.

2. That summary judgment be entered against the Defendant in favour of the Plaintiff in terms of the certificate of taxation issued on 27th April, 2015 in High Court Miscellaneous Application No. 119 of 2014 in the sum of Ksh.145,788/= plus interest thereon at the rate of 14% per annum from 20th June, 2014 until payment in full.

3. That the costs of the application and the suit be awarded to the Plaintiff/Applicant."

6. It was stated in the grounds and the affidavit in support of the application that following the issuance of the certificate of taxation, the Respondent has no defence to the claim.

7. The application was opposed. It was averred in a replying affidavit sworn by Carolyn Shavulimo, the Respondent's Acting Legal Manager, that both the Complaint and the Notice of motion ought to be struck out for being drawn by an unqualified person contrary to Section 9 & 31 of the Advocates Act. It was contended that the file the subject matter of the proceedings herein was among the 300 files that, as per the client-advocate agreement, the fee payable was as follows:

i. Instruction fees	Ksh.27,000/=
ii. VAT at 16%	Ksh.4,320/=
iii. Disbursement	<u>Ksh.8,000/=</u>
Total	<u>Ksh.39,320/=</u>

8. It was further stated that the total fees payable for the said 300 files was Ksh.11,796,000/= and that the Appellant has been paid a sum of over Ksh.20,000,000/= which amount remains uncounted. That the said agreement renders the bill of costs *otiose* and that the Bill of Costs in question can therefore not be entertained. The Respondent further averred that 7 years have passed since the conclusion of this contractual matter and the same is therefore statute barred.

9. The Respondent also filed the Preliminary Objection dated 16th July, 2015 to the application dated 16th June, 2015. The grounds are as follows:

“1. That the Complaint subsequent applications and entire proceedings be struck out on the basis of being *null ab initio* for being in contravention of Sections 31 and 45(6) of the Advocates Act.

2. That the application and the complaint herein should be struck out for having been drawn by an unqualified person contrary to section 34 of the Advocates Act.

3. That power to enter summary judgment under Section 51(2) of the Advocates Act is exclusively vested to the High Court thus this honourable court lacks jurisdiction to enter summary judgment under the Advocates Act.

4. That the Complaint be struck out and suit dismissed for being time barred under Section 4(1) of the Limitation of Actions Act.

5. That this application is fatally defective.

6. That the defense is already on record.”

10. In a supplementary affidavit sworn by the Appellant on 20th August, 2015, it was reiterated that the issue of the alleged payment was dealt with by the Taxing Master and that the issues of the agreement on fees and the taking of accounts ought to have been dealt with before the taxation. That the issue of the fees agreement is *subjudice* HCCC No. 504 of 2013 *Invesco Co. Ltd v Mercy Nduta Mwangi T/a Mwangi Kengara & Co. Advocates* and *Res judicata* – HCCC No. 65/2013.

11. The Preliminary Objection dated 16th July, 2015 was determined on 23rd November, 2015 when it was dismissed with costs.

12. The application dated 16th June, 2015 was determined on 14th June, 2016 and dismissed. The trial magistrate held that there were allegations that full payment had been made and ordered that the suit do proceed to full hearing.

13. The Appellant was dissatisfied with the said ruling and appealed to this court on the following grounds:

“1. That the Learned Trial Magistrate erred in law and in fact, when he failed to enter summary judgment for the liquidated claim of the Appellant's assessed costs of Kshs.145,788/= as evidenced by a certificate of a taxation issued on 27th April, 2015.

2. That the Learned Trial Magistrate erred in law and in fact, in holding that allegations of previous payments made prior to the taxations advanced by the Respondent's replying affidavit, were issues to proceed for trial despite there being no documentary proof of such payments before the Honourable Court and in total disregard of the principle of *Res judicata*.

3. That the Learned Trial Magistrate erred in law and in fact, in failing to consider the documentary evidence presented by the Appellant to the Honourable Court in support of the application for summary judgment, which rendered the issue of accounts *res judicata* and hence arrived at a wholly unjust decision.

4. That the Learned Trial Magistrate erred in fact and in law, by failing to evaluate submissions filed by the Appellant in support of the application for summary judgment.

5. That the Learned Trial Magistrate erred in fact and in law by failing to find that there was no competent replying affidavit filed by the Respondent for consideration by the court and misguided himself when he relied on the substantively defective affidavit to arrive at his decision.

6. That the Learned Trial Magistrate erred in fact and in law by failing to consider previous High Court rulings in Milimani HCCC 504 of 2013 (Originating Summons) Invesco Assurance Company Limited v Mercy Nduta Mwangi T/a Mwangi Keng'ara & Co. Advocates delivered on 26th September, 2014 which had dismissed a previous application for accounting for the alleged payment of Ksh.20,000,000/= plus, which ruling rendered relitigating the issue at the summary stage and a fresh, *res judicata*.

7. That the Learned Trial Magistrate erred in law and in fact by failing to consider another previous ruling on the same subject matter namely: Milimani HCCA No. 65 of 2015 Invesco Assurance Company Limited v Mwangi Keng'ara & Co. Advocates, which was delivered on 22nd May, 2015, whereby the court held that accounting for Ksh.20,000,000/= was to be done by filing of an Originating Summons and hence the trial court could not competently entertain a full hearing of the same issue.

8. That the Learned Trial Magistrate erred in law and in fact, in failing to award interest on the taxed costs at 14% per annum from 20th June, 2014 until payment in full.

9. That the Learned Trial Magistrate erred in law and in fact by failing to find that the respondent's admission of retainer rendered the purported defence a sham and therefore failed to raise any triable issue.

10. That the Learned Trial Magistrate erred in fact and in law, by failing to award the costs of the application to the Appellant.

11. That the Learned Trial Magistrate erred in law and in fact, in failing to enter final judgment the Appellant and to award costs of the suit to the Appellant.

12. That the Learned Trial Magistrate misdirected himself by failing to uphold the overriding principles of the Court and the Law as embodied in Section 1A, 1B of the Civil Procedure Act, Chapter 21 Laws of Kenya.”

14. During the hearing of the appeal, the parties relied on written submissions. I have considered the said submissions.

15. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of *Selle v Associated motor Boat Co. & others* [1968] E.A. 123 where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)”.

16. It is not in dispute that the taxation was carried out and a certificate of taxation issued for the sum of Ksh.145,788/= plus interest at 14% per annum. The said certificate of taxation has not been set aside or varied the retainer is also not denied.

17. Section 51 (2) of the Advocates Act Cap 16 provides as follows:

“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.”

18. I agree with the persuasive decision in the case of *Lubullellah & Associates Advocates v N.K. Brothers Limited* [2014] eKLR where it was stated as follows:

“The law is very clear that once a taxing master has taxed the costs issues 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 judgment... The certificate of costs is final as to the amount of the costs and the Court would be quite in order to enter judgment in favour of the applicant against the respondent herein for the taxed sum indicated in the certificate of taxation that was issued on 25th November, 2012.”

19. The Respondent's side has raised issues in respect of an agreement made between the parties on the fees payable. These are matters that ought to have raised during the taxation. Matters raised here concerning whether the suit was statutorily time barred, whether the lower court lacked jurisdiction to entertain the suit, whether the proceedings were drawn by an unqualified person and whether the issue of having a defence on record were the subject of the preliminary objection dated 16th July, 2015.

20. On 23rd November, 2015 the lower court made a ruling on the Preliminary Objection and dismissed the same. The said issues are therefore *res judicata*. The appeal herein is not on the ruling on the Preliminary Objection but in respect of the ruling dated 14th June, 2016 in respect of the Notice of motion dated 14th June, 2015.

21. Order 36 Civil Procedure Act provides for entry of summary judgment. The conditions for the entry of a summary judgment have been set out in a myriad of cases among them the case of **ICDC v Daber enterprises Ltd (2000) 1 EA 75** where the Court Appeal stated:

“To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where if necessary, there has been discovery and oral evidence subject to cross examination.”

22. The claim herein having been a liquidated one, and the defence having raised no triable issues, in the circumstances of this case, the trial court ought to have entered summary judgment for the Appellant. Consequently, I find merits in the appeal and allow the same. The ruling of the lower court delivered on 14th June, 2016 is hereby set aside and substituted with an order of entry of summary judgment in favour of the Appellant against the Respondent for the sum of Ksh.145,788/= plus interest at the rate of 14% per annum with effect from 20th June, 2014 till payment in full. Costs in the lower court and before this court to the Appellant.

Dated, signed and delivered in Nairobi this 4th day of June, 2019

B. THURANIRA JADEN

JUDGE