



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC. APPLICATION NO. 48 OF 2018

IN THE MATTER OF THE ADVOCATES ACT CAP 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE TAXATION OF BILL OF COSTS

BETWEEN

WAIGANJO WACHIRA & COMPANY ADVOCATES.....APPLICANT

VERSUS

PACIS INSURANCE COMPANY LIMITED.....RESPONDENT

RULING

1. The application before me is the Notice of Motion dated 5th December 2018 brought under Section 51(2) of the Advocates Act, paragraph 7 of the Advocates Remuneration Order and Order 51(1) of the Civil Procedure Rules 2010. It seeks orders that judgment be entered for the taxed Advocate/Client costs of Kshs. 139,627/- contained in the Certificate of Taxation dated 28th September 2018 with interest thereon at the rate of 14% per annum with effect from 16th July 2018 until payment in full.

2. The main the ground for the application is set out on face of the Motion and the affidavit of Ichaura Wachira, advocate, that the Advocate/Applicant was instructed by the Client/Respondent to represent it in **Karatina CMCC No. 116 of 2013, Joseph Njuguna v Catholic Diocese of Murang'a**. The Advocate/Applicant later filed a Bill of Costs which was taxed at Kshs. 139,627/- against the Client/Respondent on 21st September 2018.

3. The application is opposed by the Client/Respondent through the replying Affidavit sworn on 6th February 2019 by Rita Asekenye, Advocate on the ground that the applicant had failed and or refused to respond to a request by the respondent for an outlay of fees already paid to them to enable the Respondent determine the amount due the applicant That the Applicant having refused to make full disclosure of the amount due should first be compelled to do so otherwise the application as filed was ill conceived and in bad faith.

4. Parties agreed to canvass the application by way of written submissions. Respondent chose to rely on the said affidavit on record.

5. Relying on Order 19 Rule 3(1) of the Civil Procedure Rules which states:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove “

6. Counsel for the applicant submitted that 1st the affidavit on record was incompetent as it was sworn by the Advocate touching on facts only known Respondent itself. That the facts alluding to payment made to the applicant could only be deponed to by the respondent.”

7. To reinforce the position, he relied on the case of **Regina Waithera Mwangi Gitau v Boniface Nthenge [2015] eKLR** where it was held:

“The established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself viable witness for cross examination on the case which he is handling merely as an agent which practice is irregular”

9. It was also argued for the applicant that where a Certificate of Costs has already been issued this court could only deal with it by way of a reference as was held in **Muema Kitulu & Company Advocates v Obadiah Kuvinya [2011] eKLR** where it was held: -

“It is only by filing a reference by Summons to a judge that an aggrieved party can challenge a taxation and therefore a certificate of costs.”

10. That unless there was a dispute on the retainer, the only option for the court was to enter judgment. Counsel referred to **Kithi & Company Advocates v Menengai Downs Ltd [2015] eKLR** and **Winfred Nyakundi Konosi t/a Konosi & Co. Advocates v John Lokorio [2015] eKLR**. In the latter case it was held: -

“Once a certificate of costs is issued and has not been set aside or altered, no other action would be required from the court save to enter judgment upon application.”, see also **Makami, Mwangi, Wang’ong’u & Company Advocates v Invesco Assurance Company Ltd [2018] eKLR** where it was held: -

“The only reason in which the court would decline to enter judgment where an advocate’s bill has been taxed and certificate issued is here there is a dispute as to retainer”

Analysis and determination

11. Section 51(2) of the Advocates Act which stipulates 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 recovered thereby; and the court may make such order in relation thereto as it thinks fit, including where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

12. In **Lubulellah & Associates Advocates vs N K Brothers Limited [2014] eKLR** it was held: -

“The law is very clear that once a taxing master has taxed the costs, issued a Certificate of costs and there is no reference against his 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. An applicant is not required to file suit for the recovery of costs.

13. Respondent’s objections cannot be raised in the manner envisaged by the respondent. The respondent ought to have filed a reference or if there was a dispute on the amount of fees the proper forum was before the taxing master.

14. On the prayer for interest at 14% per annum the applicant relied on Rule 7 of the Advocates Remuneration Order provides as follows: -

“An advocate may charge interest at 14% 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 for interest is raised before the amount of the bill has been paid or tendered in full.**” (emphasis mine)

And the explanation given in **Kithi and Company Advocates**

Once judgement is entered on a certificate of costs the decretal amount is liable to attract interest of 14% per annum from 30 days after the service of the bill and not the date of taxation. For an advocate to be able to recover this there must be evidence on record of the date when the bill was served upon the client.

The applicant has not demonstrated that the bill was served on the responded on the 16th of September 20eighteen and the issue of interest was raised during the taxation. The interest with regard to the certificate of costs will begin to run on after the entry of this judgment. From the foregoing it is evident that upon entry of this judgment, the decretal sum will attract 14% interest.

I find the opposition is misconceived. The Applicant’s Notice of Motion dated 5th December 2018 is hereby allowed.

Judgment is hereby entered for the taxed Advocate/Client costs at Kshs. 139,627/- as contained in the Certificate of Taxation dated 28th September 2018 with interest at 14% p.a with effect from the date of this judgment.

Dated, delivered and signed at Nyeri this 7th June 2019.

Mumbua T. Matheka

Judge

In the presence of:-

Court Assistant: Nancy

Ms. Muniifu holding brief for Mr. Wachira for the Applicant

N/A for respondent

Judge