



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION NO. 195 OF 2016**

**BETWEEN**

**MAKUMI, MWANGI, WANG'ONDU & COMPANY.....APPLICANT**

**AND**

**INVESCO ASSURANCE COMPANY LIMITED.....RESPONDENT**

**JUDGEMENT**

**Applicant's Case**

1. By a Notice of Motion dated 18<sup>th</sup> December, 2017 expressed to be brought under the provisions of Section 51(2) of the *Advocates Act*, Cap 16 Laws of Kenya; Order 51 Rule 1 and 13 of the *Civil Procedure Rules*, Section 1A and 3A of the *Civil Procedure Act* and all other enabling provisions of the law, the applicant herein, **Makumi, Mwangi, Wang'onde & Company**, substantially seeks an order that judgement be entered in favour of the Advocates as against the Client for the sum of Kshs 63,310.00. As is usual in such matters the applicant also seeks an order that the costs be borne by the Client. For avoidance of doubt the Advocate herein is the Applicant while the Client is the Respondent.

2. According to the applicant, it applied for assessment of costs payable to it by the Client on account of services rendered in Machakos CMCC No. 1511 of 2010 which was assessed in the sum of Kshs 63,310.00. However despite having forwarded the Certificate of Costs to the client on or about 11<sup>th</sup> September, 2017, and followed up the same with a reminder on the November, 2017, the Client refused to settle the fee due to the Advocate hence this application.

**Respondent's Case**

3. The application was however opposed by the Respondent.

4. According to the Respondent Client, the Applicant herein was the erstwhile advocate on record for the respondent's insured in Machakos CMCC No. 1511 of 2010 – **Catherine Munywoki vs. Tawa Stage Coach Safaris, Githinji Peter & Michael Kiseve** and that on 20<sup>th</sup> December, 2017, the Respondent was served with an application dated 5<sup>th</sup> September, 2017 seeking that the Court's enters judgement for the sum of Kshs 63,310.00 in terms of the certificate of taxation dated 30<sup>th</sup> August, 2017.

5. The Respondent however averred that the applicant did not serve the Respondent with the Bill of Costs giving rise to this application and that it only came to know when the certificate of taxation was served.

6. It was the Respondent's view that the applicant's application is misguided as the applicant ought to file an enforcement suit against the respondent for recovery of the sum allegedly owing.

7. It was therefore the Respondent's case that the applicant's application was bad in law and ought to be dismissed.

**Applicant's Rejoinder**

8. In its rejoinder the applicant averred that it served the Bill of Costs on the Respondent on 1<sup>st</sup> September, 2016 and that the Respondent confirmed that the applicant acted on its behalf and that there is no allegation that the Respondent paid the Applicant's fees.

9. It was therefore its case that the application is properly before this Court.

**Determination**

10. I have considered the issues raised in this application.

11. Section 51(2) of the *Advocates Act* under which the application was based 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. It is therefore my view that where an advocate's costs have been taxed and a certificate issued, the only bar to the entry of judgement is if there is a dispute as to the retainer. As to the issue whether the Respondent was served with the Bill, that is a matter which can only be dealt with in an application for setting aside or reference. It cannot certainly be a valid objection to application brought under section 51(2) of the *Advocates Act*.

13. In this case as retainer is not disputed there is no reason why judgement cannot be entered in terms of the Certificate of Costs. In **Mbai & Kibuthu Advocates vs. Mbo-I-Kamiti Farmers Company Limited Nairobi (Milimani) HCMA No. 659 of 2004, Ochieng', J** held that where there is no dispute as to the retainer and the bill has been taxed, the certificate of the taxing officer by whom the bill has been taxed shall, unless set aside or altered by the Court, be final as to the amount of costs covered thereby. Accordingly, the Court proceeded to grant judgement in favour of the applicant.

14. In other words once a certificate of the taxing officer by whom an advocate and client bill has been taxed, unless the same is set aside or altered by the Court, it is final as to the amount of the costs covered thereby, and there is no need to file a suit for recovery therefor and the Court is thereby empowered, to order that judgment be entered for the sum certified to be due with costs. **Warsame, J** (as he then was) therefore held in **Ragot & Company Advocates vs. West Kenya Wholesalers Ltd Kisumu HCMISCCA No. 244 Of 2002** that under section 51(2) of the *Advocates Act*, a certificate of the taxing master when acquired is final as to the amount and when there is undisputed retainer section 48(2) and 49 of the *Advocates Act* cannot apply. Similarly, **Ochieng' J** in **Kerandi Manduku & Company vs. Gathecha Holdings Limited Nairobi (Milimani) HCMA No. 202 of 2005** held that section 51(2) of the *Advocates Act* gives the Court the discretion to enter judgement where a suit has not been filed for recovery of costs due to an advocate. This section is, however, only exercisable where there is no dispute as to the retainer and a certificate of the taxing officer has been issued and has not been challenged.

15. It follows that there is no basis upon which the orders sought in this application cannot be granted.

16. Consequently, judgement is hereby entered in favour of the Applicant/Advocates in the sum of Kshs 63,310.00 together with costs.

17. It is so ordered.

**Judgement read, signed and delivered in open Court at Machakos this 12<sup>th</sup> day of June 2018.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr B. N Nzei for Miss Mwangi for the Applicant/Advocate.**

**CA Geoffrey.**