



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 319 OF 2016**

**MERCY NDUTA MWANGI T/A**

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

**VERSUS**

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

**(Being an appeal from the Ruling of the Chief Magistrate's Court at Nairobi by the Hon L. Kassan, Senior Principal Magistrate dated 14<sup>th</sup> June 2016 in CMCC No 4580 of 2015)**

**JUDGMENT**

**INTRODUCTION**

1. In his Ruling of 14<sup>th</sup> June 2016, the Learned Trial Magistrate L. Kassan, Senior Principal Magistrate, dismissed the Appellant's Notice of Motion application dated 28<sup>th</sup> October 2015 seeking orders that the defence be struck out and judgment be entered against the Respondent herein. He ordered that each party bears its own costs.
2. Being aggrieved by the said Ruling, the Appellant filed her Memorandum of Appeal dated 22<sup>nd</sup> June 2016 on even date. Her Record of Appeal was dated and filed on 21<sup>st</sup> February 2016. Her Written Submissions were dated 21<sup>st</sup> February 2018 and filed on 22<sup>nd</sup> February 2016. The Respondent's Written Submissions were dated 16<sup>th</sup> May 2018 and filed on 17<sup>th</sup> May 2018.
3. When the matter came up in court on 23<sup>rd</sup> May 2018, both parties requested this court to render its Judgment based on their respective Written Submissions that they were relying upon. This Judgment is therefore based on the said Written Submissions.

**THE APPELLANT'S CASE**

4. The gist of the Appellant's case was that the Learned Trial Magistrate erred in law and fact when he failed to enter summary judgment, the sum of Kshs 115,473/= that had been assessed as costs due and owing to it by the Respondents, as was evidenced in the Certificate of Taxation issued on 1<sup>st</sup> July 2015.
5. It was her contention that the Learned Trial Magistrate ought not to have directed that the matter proceed for hearing because the Respondent had not adduced any documentary evidence to prove that it had paid her costs in full.
6. She added that the High Court had dismissed a previous application that the Respondent had filed for accounting of a sum of Kshs 20,000,000/= on 26<sup>th</sup> September 2014 in **HCCC 504 OF 2013 (OS) Invesco Assurance Company Limited vs Mercy Nduta Mwangi t/a Mwangi Keng'ara & Co Advocates**. She also stated that the High Court in **HCCA No 65 of 2015 Invesco Assurance Co Ltd vs Mercy Nduta Mwangi t/a Mwangi Keng'ara & Co Advocates** also delivered its Ruling on 22<sup>nd</sup> May 2015 whereby it was held that accounting for Kshs 20,000,000/= was to be done in an Originating Summons (OS) that was to be filed.
7. It was her contention that the Learned Trial Magistrate failed to consider the said two (2) Rulings and consequently, his decision not to enter summary judgment against the Respondent was tantamount to relitigating the matter yet the same was now *res-judicata*.
8. She relied on the cases of **Zola & Another vs Ralli Brothers Ltd & another [1969] EALR** and **Gohil vs Wamai [1983] eKLR** justifying why the Learned Trial Magistrate ought to have entered judgment against the Learned Trial Magistrate. The common thread of the

holdings were that where the claim is for a liquidated sum and there is no good defence, then summary judgment ought to be entered in favour of an applicant so as not to be unnecessarily kept away from the fruits of his judgment.

9. She also referred this court to the cases of **Owino Okeyo & Co Advocates vs Fuelex Kenya Ltd [2005] eKLR**, **Lubullelah & Associates Advocates vs N K Brothers Ltd [2014] eKLR** and **Linda Watiri Muriuki vs Neville Patrick Gibson & 3 Others [2013] eKLR** where different courts held that where an advocate has complied with the provisions of Section 51 (2) of the Advocates Act, then the court has no alternative but to enter judgment in the sum appearing in the certificate of costs.

10. She therefore urged this court to allow her Appeal on the ground that the same was merited.

#### **THE RESPONDENT'S CASE**

11. The Respondent's case was that it filed its Defence where it showed that it paid the Appellant all its monies as was shown in the Schedule indicated therein.

12. It argued that entry of summary judgment was draconian and its application acts as a bar to filing a defence. It relied on the case of **Transcend Media Group Ltd vs IEBC [2015] eKLR** where the court therein held that the statement of defence therein raised triable issues and consequently, summary judgment could not be entered therein. It also placed reliance on the case of **Capital Construction Co Ltd vs National Water Conservation and Pipeline Corporation [2013] eKLR** where Havelock J (as he then was) stated that the threshold of striking out pleadings is high.

13. It was emphatic that it would be barred from enjoying its fundamental right to fair trial in line with Article 22 (3) (d) of the Constitution of Kenya, 2010 which provides that the Chief Justice shall make rules providing for the court proceedings which shall not be unreasonably restricted by technicalities. In this regard it relied on the cases of **ICDC vs Daber Enterprises Ltd [2000] 1 EA 75** and **Parminder Singh Sandhu [2009] eKLR** where the holdings were that summary judgment can only be entered in clear and plain cases and that a triable issue is not one that a defendant would necessarily succeed upon but rather, it is an issue that must be *bona fide*.

14. It therefore urged this court to dismiss the said Appeal with costs to it so that the matter in the lower court can proceed for full trial.

#### **LEGAL ANALYSIS**

15. On 1<sup>st</sup> July 2015, the Appellant was issued with a Certificate of Taxation for the sum of Kshs 115,473/= in **High Court Misc Application No 28 of 2015– Muranga**. Interest thereon was to run from 20<sup>th</sup> April 2015 at fourteen (14%) per cent per annum until payment in full. The said Certificate of Taxation was issued after the Advocate/Client Bill was taxed. The Respondent filed a Preliminary Objection dated 21<sup>st</sup> October 2015 but the same was dismissed.

16. The Appellant's Notice of Motion application dated 3<sup>rd</sup> September 2015 seeking summary judgment against the Respondent in the sum of Kshs 115,473/= was dismissed. She submitted that she was entitled to the orders sought under Order 36 Rule 1 (a) of the Civil Procedure Rules because the Respondent had entered appearance but had not filed a defence and that the demand was for a liquidated sum.

17. She added that the refusal to the Learned Trial Magistrate to enter summary judgment against the Respondent implied that the taxed amount could be varied.

18. On the other hand the Respondent was emphatic that granting an order for summary judgment against it denied it a right to be heard.

19. It was clear to this court that the question that had been placed before it for determination was whether or not the Appellant had demonstrated in her Notice of Motion application dated 3<sup>rd</sup> September 2015 that she had met the threshold of entry of summary judgment against the Respondent herein.

20. Section 51 (2) of the Advocates Act Cap 16 (Laws of Kenya) 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”.**

21. As was held by this court in the case of **Lubullelah & Associates vs N K Brothers Limited** (Supra) and as was held by other courts in **Owino Okeyo & Co vs Fuel Max Kenya Ltd** (Supra) and **Daly & Figgis Advocates vs Homelex Ltd [2013] eKLR**, once any bill of costs is taxed the certificate of costs remains final unless the same is set aside or altered by the court. Where the certified sum is not disputed, the court may make any order as it thinks fit including an order that judgment be entered for the sum certified to be due with costs.

22. A perusal of the proceedings before the lower court did not show whether or not the Respondent obtained orders to set aside the Certificate of Costs or have it altered by the court. For all purposes and intent, the Certificate of Costs issued on 1<sup>st</sup> July 2015 remained unchallenged and the court could order entry of judgment.

23. As to whether the Appellant ought to have raised a Bill of Costs in a lower court matter was a different matter altogether. This court addressed such an issue in **John Nyariki vs British American Co (K) Ltd [2015] eKLR**. However, as this court, this order did not deem it

necessary to interrogate the same. It shall say no more on this issue.

24. It was evident from the proceedings herein that the Appellant filed her Notice of Motion application dated 3<sup>rd</sup> September 2015 on 4<sup>th</sup> September 2015. The Respondent filed its Memorandum of Appearance dated 27<sup>th</sup> August 2015 on 31<sup>st</sup> August 2015. The effect of the Appellant's application was that since the Respondent had not filed a defence by the time she filed her said Notice of Motion, then the Respondent ought to have sought leave to file its defence.

25. Indeed, Order 36 Rule 1 of Civil Procedure Rule provides as follows:-

(1) In all suits where a plaintiff seeks judgment for—  
a) a liquidated demand with or without interest; or  
b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

26. There was no indication in the proceedings in the lower court that the Respondent sought leave to file its Statement of Defence dated 14<sup>th</sup> September 2015 on 16<sup>th</sup> September 2015. The said Statement of Defence could not sustain an argument of triable issues having been raised because the same was filed without leave of the court. The Appellant therefore acted correctly when she filed her Reply to Defence under protest dated 24<sup>th</sup> September 2015 on the same date.

27. After the Appellant obtained a certificate of costs, the proper procedure was for the Respondent to have applied to have the Certificate of Costs set aside or altered. It could not raise issues on the agreements between itself and the Appellant in the suit in the lower court. That was an issue that should have been addressed in taxation proceedings.

28. Going further, the Learned Trial Magistrate erred when he relied on the Respondent's Statement of Defence because the same was not properly on record. For that reason, the Appellant's Notice of Motion application dated 3<sup>rd</sup> September 2015 and filed on 4<sup>th</sup> September 2015 remained unopposed.

29. Accordingly, having considered the parties Written Submissions and the case law they relied upon, it was the considered opinion that this was a plain and clear case for entry of summary judgment. As the Respondent did not demonstrate that the certificate of costs had been set aside or altered, the Learned Trial Magistrate ought to have allowed the Appellant's Notice of Motion application dated 3<sup>rd</sup> September 2015 and filed on 4<sup>th</sup> September 2015. Notably, the Respondent filed its Statement of Defence without leave of the court. It was of no consequence.

30. Failure by the Learned Trial Magistrate to enter judgment as the Appellant had sought merely put her away from the fruits of her judgment for an indeterminate period. This was a plain and clear case for entry of summary judgment.

### **DISPOSITION**

31. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 22<sup>nd</sup> January 2015 was merited and the same is hereby allowed with costs to the Appellant.

32. The Ruling of the Learned Trial Magistrate of 14<sup>th</sup> June 2016 therefore is hereby set aside and/or vacated and in its place it is hereby directed that summary judgment be and is hereby entered against the Respondent in favour of the Appellant for the sum of Kshs 115,473/= plus interest thereon at fourteen (14%) per cent per annum from 20<sup>th</sup> April 2015 until payment in full in terms of the Certificate of Taxation that was issued in **High Court Miscellaneous Application No 28 of 2015 Muranga**.

33. It is so ordered.

**DATED and DELIVERED at NAIROBI this 19<sup>th</sup> day of September 2018**

**J. KAMAU**

**JUDGE**