



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC CIVIL APPLICATION NO. 191 OF 2016

MAKUMI, MWANGI, WANGONDU & CO. ADVOCATES.....APPLICANT

VERSUS

INCESCO ASSURANCE CO. LTD.....RESPONDENT

RULING

1. The Applicant herein filed a Notice of Motion dated 5/9/2017 pursuant to Section 51 (2) of the Advocates Act seeking for the following reliefs namely:

(a) That the judgment be entered in favour of the Applicant as against the Respondent for the sum of Kshs. 65,697/=.

(b) That the costs of the application be provided for.

2. The Application is supported by grounds on the face thereof and further by the affidavit of Beth Mwangi sworn on even date who has deponed *inter alia* that the Applicant rendered their services to the Respondent in **Machakos CMCC No. 507 of 2011** and thereafter the fees were taxed at Kshs. 65,697/= which remains unpaid by the Respondent; that judgment should now be entered against the Respondent for the said sum; that the Respondent had been represented by the law firm of Janet Jackson during the taxation of the Bill of Costs; that the Respondent's payment of kshs. 41,078/= was in regard to another matter not related to the primary suit herein; that the Respondent has had every opportunity to question the validity of the fees claimed but failed to do so during the taxation process; that the allegation raised by the Respondent at this stage is meant to delay the payment of fees rightly due to the Applicant; that it is in the interest of justice that the orders sought are granted.

3. The application was strenuously opposed by the Respondent whose counsel Maina Njuguna filed a replying affidavit dated 23-2-2018 raising the following grounds of opposition namely:

(i) That the Applicant who had represent the Respondent in the primary suit Machakos CMCC No. 507 of 2011 was fully paid for her services in the sum of Kshs. 41,078/= via remittance EFT No. 080682015 dated 7/8/2015.

(ii) That the Applicant did accept the said payment as the final legal fees.

(iii) That upon the payment of the said sum the Respondent felt that the matter had been settled in full, thus bringing the matter to finality.

(iv) That the Applicant filed this suit despite knowledge that the legal fees had been fully settled.

(v) That it is evident that the Applicant has no valid claim against the Respondent for any other sums owing as the Applicant appears out to achieve unjust enrichment at the expense of the Respondent.

4. Learned counsel for the parties herein did not file submissions and settled on the rival affidavits. I have considered the said rival affidavits and annexures thereto and find the following issues necessary for determination namely:

i) Whether or not the Applicant had been paid their fees by the Respondent in final settlement of the primary suit number Machakos CMCC 507 of 2011.

ii) Whether or not the Applicant's application dated 5-9-2017 has merit.

5. As regards the first issue, it is noted that the Applicant herein vide their letter dated 18/11/2013 had sent its final fees note to the Respondent in which it had claimed the sum of Kshs. 43,607/= in respect of the primary suit in **Machakos CMCC 507 of 2011**. The

Respondent in its replying affidavit has confirmed that it duly paid the final legal fees in the sum of Kshs. 41,078/= less Kshs. 2,529/= being retained for the purposes of withholding tax certificate. The Applicant claims that the said sums were in respect to a different case. Indeed the Applicant proceeded to have its Bill of Costs taxed and went ahead to file a reference against the taxation by the Deputy Registrar which culminated into this court's ruling dated 10/5/2017 in which the reference was allowed and the costs varied to Kshs. 65,697/= which sum is now being sought from the Respondent by the Applicant. The Applicant further maintains that the Respondent had been aware of the developments herein and should not be allowed to derail the Applicant from getting its just dues. On the other hand, the Respondent maintains the Applicant's fees had already been cleared and the present application is meant to unjustly enrich the Applicant at the expense of the Respondent. I have keenly perused the Respondent's letter dated 12-8-2015 forwarding the sum of Kshs. 41,078/= to the Applicant. The letter is in respect of **Machakos CMCC No.507 of 2011 John Sila Muli -VS- Geoffrey Munyao**, I find the sums paid to the Applicant plus the withheld sum of Kshs. 2,529/= all total to the sum of Kshs. 43,607/= that had been demanded by the Applicant in its letter dated 18/11/2013 being the final fee note. It is therefore highly likely that the said sums had been in regard to the primary suit **Machakos CMCC No. 507 of 2011** and not for any other case. The respondent's letter dated 12/8/2015 has the correct details on the names of the defendant and the year the suit was filed save only for the name of the plaintiff and the court number for the year 2011. This court went out of its way to check the lower court and cases file register for the year 2011 and established that in the particular year namely 2011 the last case number registered is 1174 of 2011. That being the position, I find the details on the Respondent's letter dated 12/8/2015 might have had some typing errors. Even though the Respondent has not sworn affidavit regarding the anomaly, I find that this court being a court of equity is under obligation to do justice as circumstances demand. I am satisfied from the explanation given by the Respondent that indeed the Applicant had been paid its legal fees in full. This would then explain the Respondent's failure to pursue and participate in the taxation of the Applicant's Bill of Costs and the subsequent reference since as far as they were concerned, the fees had been cleared, I find it would be unjust to slap the Respondent with further fees yet according to them they had already settled the same. Again, the Applicant would end up getting double payment in form of fees. The Applicant despite claiming that the monies had been paid for another matter, failed to go further and avail evidence of any fee note or demand in regard to that other suit just like it did in this primary suit vide their letter dated 18/11/2013. I have no doubt in my mind that the payment by the Respondent in the sum of Kshs. 41,078/= was indeed in respect of the primary suit herein namely **Machakos CMCC No. 507 of 2011** and not for any other suit. Consequently, I find the Applicant had been paid their fees in final settlement over the primary suit **Machakos CMCC No. 507 of 2011** by the Respondent.

6. As regards the second issue and in view of the foregoing observations, I find that the Applicant's application dated 5/9/2017 was not necessary as its fees had already been settled by the Respondent. Consequently, I find the application dated 5/9/2017 lacks merit. The same is ordered dismissed. Each party to bear their own costs.

It is so ordered.

Dated and delivered at MACHAKOS this 6th day of November, 2018.

D. K. KEMEI

JUDGE