



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. APPLICATION NO. 127 OF 2014

IN THE MATTER OF TAXATION OF ADVOCATES-CLIENT'S BILL OF COSTS

AND

IN THE MATTER OF ADVOCATES ACT CAP 16 LAWS OF KENYA

BETWEEN

JOSEPH MBOYA OGUTTU t/a

M/S OGUTTU-MBOYA & CO. ADVOCATES..... APPLICANT

VERSUS

ANDREW MAUTI OCHARO RESPONDENT

RULING

1. A certificate of taxation dated 20th November 2014, made in favour of the applicant, **Joseph Mboya Oguttu t/a Oguttu Mboya & Co. Advocates**, was on the 10th December 2014, issued against the respondent, **Andrew Mauti Ocharo**. Thereafter, a notice of motion dated 11th December 2014, was taken out by the applicant seeking judgment against the respondent in terms of the certificate of costs for the sum of Ksh. 93,538/= together with interest at 14% per annum from the date of taxation until payment in full.

An order to levy execution against the respondent was also sought.

2. The application is founded on the grounds contained in the body of the notice of motion and the averments in the supporting affidavit deponed by the applicant on the 11th December 2014.

On the 28th November 2016, the respondent filed an undated and unsigned affidavit described as a supporting affidavit although it should actually be a replying affidavit to the application. Nonetheless, the affidavit may be accepted as the respondent's response to the application and more so, considering that the respondent acted in person.

In any event, the court is behoved to look into the substance of the affidavit rather than its form.

3. In essence, the respondent's response to the application is a challenge on the assessment of the applicant's bill of costs by the deputy registrar/taxing master arising from Rongo SRMCC No. 249 of 2011, in which the respondent was represented by the applicant and in which the respondent was the

plaintiff and one Mogeni Onduso, was the defendant.

The respondent altogether raises issues with the taxation proceedings which led to the issuance of the material certificate of taxation in favour of the applicant.

4. As directed by the court, both parties filed their respective written submissions which have been given due consideration by this court in the light of the grounds for and against the application.

Apparently, the bone of contention and thus, the issue for determination is whether the applicant is entitled to judgment against the respondent for the sum of Kshs. 93,538/= being the taxed costs as reflected in the certificate of taxation.

5. In his submissions, the respondent went to great lengths to show that the assessment of the applicant's bill of costs by the taxing master was not based on the actual facts and was indeed erroneous. He also imputed bad faith and malice on the part of the applicant in presenting the bill of costs for taxation.

On his part, the applicant in his submissions implied that he was not prompted by bad faith to present the bill of costs and all that he did was based on his professional duty to act for the respondent as instructed. He discharged his duties up to February 2014, when a disagreement between him and the respondent arose. He then applied for and obtained leave of the court to cease from acting for the respondent. He thereafter was constrained to and indeed filed Advocate-Client's Bill of Costs for taxation after the respondent became belligerent and failed to settle his outstanding professional fees.

6. From the arguments advanced by the parties, it is clear that there is no dispute that the applicant was retained by the respondent to act for him in Rongo SRMCC No. 249 of 2011. The retainer, was apparently terminated when the two disagreed thereby causing the applicant to cease from acting even after undertaking his professional duty with honour and commitment. It therefore fell upon the respondent to discharge his part of the bargain by clearing the accrued professional fees due to the applicant. The respondent did not meet his obligation thereby causing the applicant to present to the court a bill of costs for taxation with necessary notice to the respondent.

7. Black's Law Dictionary defines retainer as follows:-

"In the practice of law, when a client hires an attorney to represent him, the client is said to have retained the attorney. This act of employment is called the retainer. The retainer agreement between the client and attorney sets forth the nature of services to be performed, costs, expenses and related matters".

Having been retained by the respondent, whether orally and/or in writing, the applicant was entitled to his professional fees and therefore within legal boundaries to present his bill of costs for taxation.

The respondent was accordingly notified and the matter was fixed for taxation finally on 2nd October 2014, when the respondent through his new advocate, **M/S Nyamori Nyasimi & Co.** appeared before the taxing master/deputy registrar and opposed the bill as drawn.

After hearing both sides, the deputy registrar rendered her ruling on 20th November 2014, in which she assessed the bill at Kshs. 93,538/=. The Certificate of Taxation was issued to that effect on 10th December 2014.

8. S.51 (2) of the Advocates Act provides that:-

"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 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".

The opposition raised by the respondent in this matter is not valid to prevail upon this court not to grant the orders sought herein by the applicant.

As it is obvious that the respondent was granted the opportunity to oppose the bill and did indeed oppose the bill during the taxation proceedings before the deputy registrar, he cannot be heard to raise a similar objection in this matter.

9. S. 51(2) of the Advocates Act, indicates that the certificate of the taxing officer is a final document in settling the amount of costs due from a party unless it is set aside or altered by the court which is not the case in this matter. It confirms that an advocate is entitled to judgment in the taxed costs where the retainer is not disputed as in this case (see, **Owino Okeyo & Co. Advocates Vs. Fuelex (K) Ltd NBI Misc Civil Application No. 382 of 2004**).

Rather than wait and challenge the bill of costs in this application, the respondent if he was aggrieved by the ruling of the deputy registrar ought to have filed a notice of objection to taxation followed by a reference to the High Court pursuant to Rule 11 of the Advocates Remuneration Order.

10. For all the foregoing reasons, the respondent's objection to this application cannot be sustained and is hereby overruled. The applicant is thus entitled to judgment against the respondent for the sum of Ksh. 93,538/= in terms of the certificate of taxation together with interest on the sum at the normal rate with effect from the date of filing of this application (i.e 16th December 2014) until payment in full.

The applicant shall also be entitled to the costs of the application.

In sum, the application is allowed as hereinabove specified.

[Read and signed this 9th day of February 2017]

J.R. KARANJAH

JUDGE

In the presence of

Mr. Bigogo holding brief for

Mr. Oguttu Mboya for the Applicant

Respondent in person

Njoroge/Dorothy CC