



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NUMBER 645 OF 2014

NJUGUNA & PARTNERS ADVOCATES. APPLICANT

VERSUS

LIZZY WAMBUI KINGORI..... 1ST RESPONDENT

JANE NJERI NG'ARU. 2ND RESPONDENT

ESTHER NJERI MUIGAI. 3RD RESPONDENT

RULING

What is before the court for determination is the application dated the 25th April, 2016 by way of a Notice of Motion, brought under Section 51(2) of the Advocates Act Chapter 16 Laws of Kenya. The Applicant has sought the following orders: -

1. The judgment be entered for the Applicant as against the Respondents jointly and severally for the sum of Ksh.610,219/- being the certified costs due to the Applicant.
2. That the Respondents do pay to the applicant interest on the certified costs at 14% per annum from date of taxation until payment in full.
3. That the Respondents do pay to the Applicant the costs of this application.

The grounds in support of the application are that the advocate-client costs due to the applicant have been taxed at Ksh.610,219/- and a certificate of taxation issued to that effect. That there is no dispute that the Respondents retained the Applicant herein as their advocate in respect of which the Advocate-client costs were taxed. The instructions were given in HCCC No 658 of 2009.

That after the respondents failed to pay the Applicant's fee, the Applicant filed a bill of costs for taxation and the same was taxed on the 31st March, 2016 in the sum of Ksh.610,219/- and a certificate of taxation issued to that effect on 15th April, 2016.

The Respondents have opposed the application and have filed three separate replying affidavits.

The contents of the replying affidavits are essentially similar. They aver that though the applicant filed a joint statement of defence and counter-claim for them, each Respondent had a separate claim which were lumped together in one defence upon the advice by the Applicant.

That in line with the separate claims by the Respondents, the Applicant entered into an agreement with

each of the Respondents to divide the fees into three equal portions with each taking a third of the total fees. Each was supposed to pay Ksh.245,020/-.

They further aver that pursuant to those agreements, which each of them has annexed to their respective affidavits, they each paid different amounts and have been issued with receipts of the amounts that they have paid.

They contend that, it would be contrary to the agreements between the Applicant and themselves for this court to enter judgment against them severally and jointly as this would contravene the rules of taxation with respect to several defendants and unfairly burden one or some of them. They further averred that to guarantee fairness, justice and to uphold the public interest, judgment ought to be entered only after taking into account the amounts of the bill to be apportioned to each of them and the sums paid by each of them.

The 1st Respondent has also relied on her affidavit sworn on 28th September, 2015. I have perused the same and I note that it was filed in respect to the proceedings before the taxing officer and it does not have any material relevance to the application before the court.

In a further affidavit sworn by Charles Mbugua Njuguna advocate on 27th June, 2016, he avers that the instructions from the Respondents were never split out throughout the proceedings in HCCC No. 658 of 2009.

That they authorized the 1st Respondent to plead on their behalf and that no agreements were entered with them to divide the fees into three equal parts or any portion whatsoever as alleged by the Respondents. That the costs as taxed have factored in, the amounts already paid by the Respondents and its impossible to allocate or apportion the said payments and that if any of the Respondents have a claim against the other, they are at liberty to pursue them.

In his submissions, counsel for the Applicant submitted that the Respondents have not denied having retained him for legal services in High Court case Number 658 of 2009. He also submitted that they have not challenged the certificate of taxation and the same is valid.

On the agreement on fees referred to by the Respondents, he urged the court to bear in mind what a proper agreement should constitute, while on the issue of part payment of the fees, it was his contention that the same was raised before the taxing officer.

The court has given due consideration to the application and the submissions by the counsels for the respective parties. The Applicant has sought for the orders that judgment be entered against the Respondents being the certified costs due to them. The costs in the sum of Ksh.610,219/- was taxed on the 31st March, 2016 and a certificate of taxation issued to that effect on the 15th April, 2016. From the affidavits and the submissions by the counsels, it is not in dispute that the Respondents herein instructed the Applicant to act for them in HCCC No. 658 of 2009 **Exdamum Contractors and Developers limited Vs Liz Wambui Kingori, Jane Ng'aru and Esther Njeri Muigai**. This, therefore, means that the retainer is not disputed. However, what seems to be the issue is the entry of judgment against the Respondents jointly and severally. According to them, each of them had a separate claim which the Applicant lumped into one defence. They further aver that the Applicant entered into an agreement with them to divide the fees into three equal portions with each taking a third of the fees. They have annexed the handwritten documents which they refer to as the agreements between them and the applicant. This court has looked at the handwritten notes annexed to the affidavits of the Respondents and the following are noted.

1. The so called agreements do not indicate the names of the parties.
2. They are not signed by the parties.

3. The subject matter of the agreements is not indicated, i.e. the case number.

I have made a quick reference to Section 45 of the Advocates Act on Agreements with respect to remuneration and it provides that an advocate and his client can make an agreement fixing the amount of the advocate's remuneration but such an agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf. In view of the above provision, the handwritten documents do not qualify as agreements as they have not been signed as required under that Section.

A careful perusal of the affidavits by Respondents reveals that they are not challenging the certificate of taxation. The only issue is that they had agreed on fees and that each of them was to pay a third of the fees and that part-payment has been made towards the legal fees. In his submissions, counsel for the Applicant submitted that this issue was raised before the taxing officer. This fact was not denied by the counsel for the Respondents.

What I am able to gather from the affidavits filed herein is that a joint defence was filed for the Respondents in HCCC No. 658 of 2009 and a certificate of taxation was issued by the taxing officer.

Section 51(2) of the Advocate's Act is clear on finality of a Certificate of Taxation and 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.”

The Respondents have not challenged the certificate of costs herein. The court also notes that they participated in the taxation and they were represented by an advocate.

In the premises and for the foregoing reasons, I find merits in the application dated 25th April, 2016 and the same is allowed with costs to the Applicant.

Dated, signed and delivered at Nairobi this 2nd day of February, 2017.

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L NJUGUNA

JUDGE

In the presence of

..... *for the Applicant*

..... *for the Respondent*