



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL CAUSE NO. 18 OF 2016

OTIENO RAGOT & CO. ADVOCATES.....ADVOCATE/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LTD.....CLIENT/RESPONDENT

ARISING FROM

KISUMU H.C.C. NO. 367 OF 1997

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

EZEKIEL K. BARGETUNY.....DEFENDANT

RULING

On 23rd February 2016 the Advocate/Respondent filed a Bill of costs which the Deputy Registrar/Taxing Officer by a ruling delivered on 28th June 2016 taxed at Kshs.3,279,534/83. Thereafter a certificate of costs dated 29th June 2016 and which was signed by the Taxing Officer issued.

On 5th July 2016 the Advocate/Respondent filed a Notice of Motion dated 1st July 2016 seeking judgment on the taxed costs together with interest. The application was fixed for hearing on 8th September 2016, but before it could be heard the Client/Applicant filed a Chamber Summons application which inter alia sought a stay of execution of the costs and also to set aside the Deputy Registrar/Taxing Officer's ruling on the taxation. The Client/Applicant also sought an order that the matter be referred back to the Deputy Registrar/Taxing Officer for taxation.

As the Client's application was filed under Certificate of Urgency it was given a hearing date earlier than that of the Advocate. It is however not clear what transpired on 26th July 2016 when the Client's application was to be heard inter partes though the record shows that two days later Counsel appearing for the Advocate attended and was directed to return on 8th September 2016 when the Advocate's application was scheduled to be heard. Counsel for the Client was not in Court that day.

On 8th September 2016 the Advocates for both parties attended and an argument arose as to which application would be heard first. However even before the close of those arguments Counsels consented to have the Advocates application allowed the consequential orders being that judgment was entered for the Advocate in terms of the Certificate of costs. It was then agreed that there would be a stay of execution pending hearing and determination of the Client's application. That is the application that was argued before me on 16th January 2017. Mr. Ojuro appeared for the Client/Applicant while Mr. Otieno

D. appeared for the Advocate/Respondent.

I have considered the arguments by both sides and also perused the proceedings before the Deputy Registrar/Taxing Officer. I am also alive to the principle that I can only interfere with the Taxing Officer's decision if there be an error of principle. This case is on all fours with that of **D. Njogu & Company Advocates VS National Bank of Kenya NAIROBI CIVIL APPLICATION NO. 165 OF 2007** where the Advocate was retained on almost similar terms and where the Court of Appeal upheld the finding of the High Court that the retainer agreement was illegal and short of basing his fees thereon, the Advocate could not bypass it by filing a bill of costs for taxation. The Court of Appeal stated:-

“[25] We entirely agree with the sentiments expressed by the learned Judge. The appellant is a firm of advocates headed by an advocate of the High Court, who as an officer of the court must be deemed to be well aware of the provisions of the Advocates Act and the Advocates Remuneration Order. We are in no doubt that the appellant was aware of the illegality and the consequences of anchoring its relationship with the respondent on such illegality. No doubt the “carrot” was the assurance of a retainer and assignment of legal work. Having succeeded in getting the work in accordance with the illegal agreement, the appellant cannot now turn round and seek the Court's intervention in getting a different remuneration from what was offered and agreed. Indeed, it is an abuse of the court process for the appellant to seek the Court's intervention in basing its fees on the Advocates Remuneration Order whose provisions he had in the first instance deliberately ignored.

[26] In our view an advocate who willingly and knowingly enters into an agreement in regard to the payment of his fees that is contrary to the Advocates Remuneration Order, cannot maintain proceedings whose purport is to avoid the illegal agreement by reverting to the Court to tax his advocate/client bill of cost in accordance with the Advocate's Remuneration Order. We concur with the learned Judge that the appellant having made his bed he must lie on it. That is to say that, notwithstanding the illegality of the contract, this court cannot come to the appellant's aid as the appellant is estopped by his conduct from seeking the court's intervention. We find no merit in this appeal as the appellant's bill of costs was properly struck out. Accordingly the appeal is dismissed with costs.”

Similarly the Advocate in this case ought to have relied on the retainer agreement champetous as it is and not tried to avoid it by filing his bill for taxation. However it is of note that unlike in the case of **D. Njogu & Company Advocates VS National Bank of Kenya Limited** (supra) Mr. Ojuro, Advocate for the Client consented to the taxation of the Bill of costs by the Taxing Officer. He is clearly on record as telling the taxing officer that he consented to all the items save for the instruction fees (Item 1) and the getting up fees (Item 2). That consent was recorded by the Taxing Officer as follows:-

“By Consent

1. Brief submissions on Item 1 & 2

2. Item 3 to 97 and from 98 to 127 are conceded by respondent by consent”

The Taxing Officer then went ahead to hear submissions on the items not conceded and subsequently taxed them and the entire bill of costs at Kshs.3,279,534/83. It is for that sum that the Advocate sought judgment in the Notice of Motion dated 1st July 2016. Again the record shows that when Mr. Otieno D, for the Advocate and Mr. Ojuro for the Client appeared before me on 8th September 2016 for hearing of the Notice of Motion an argument arose as to whether the Court would hear this Notice of Motion first or whether a Chamber Summons filed by the Client and which for all intents and purposes was in opposition to the Notice of Motion would take precedence. However even before Mr. Otieno D could complete his reply a consent was reached that the Notice of Motion be allowed and that judgment be entered for the Advocate accordingly. This Court therefore entered judgment in terms of the Notice of Motion. My finding is that having consented to the taxation of the Bill and having consented to the entry of judgment in terms of the Certificate of costs as sought in the Advocate's Notice of Motion, Mr. Ojuro waived, so to speak, his Client's right to rely on the Retainer Agreement champetous as it is. That is what distinguishes

this case from the case of **D. Njogu & Company Advocates V. National Bank of Kenya** case (supra). The Advocate having willingly and knowingly entered into the agreement which went contrary to the Advocates Act had no right to avoid it by having filing a bill for taxation but then the Client's Advocate consented to the taxation and made no mention of that agreement to the Deputy Registrar. He also consented before this Court, to the entry of judgment in terms of the resultant Certificate of costs with knowledge of the agreement conceded to his client's application being heard long after the judgment was entered. That consent having been entered willingly this Court would have no justification to go against it. The client's application in the Chamber Summons dated 18th July 2016 is therefore dismissed. However given the circumstances of this case I shall order that each party bear its own costs. This ruling shall apply mutatis mutandis to **Kisumu High Court Misc. Application No. 48 of 2016 Otieno Ragot & Company Advocates VS National Bank of Kenya Ltd.** and **Kisumu High Court Misc. Application No. 120 of 2016 Otieno Ragot & Company Advocates VS National Bank of Kenya Limited** where similar applications were made and which were heard together with this application as if they were consolidated.

It is so ordered.

Signed, dated and delivered at Kisumu this 16th day of February 2017

E. N. MAINA

JUDGE

In the presence of:-

Mr. Ragot for the Respondent/Advocate

Mr. Echura for the Applicant/Client

C/A: Serah Sidera