



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**HC. MISC. CIVIL APPLICATION NO. 375 OF 2016**

**CONSOLIDATED WITH**

**HC. MISC. CIVIL APPLICATION NO. 420 OF 2016 & 492 OF 2016**

**O.M. ROBINSON & CO. ADVOCATES.....APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT**

**RULING**

1. The applications before me were consolidated on 6th April, 2017. The prayers being sought are similar in nature save for the amounts being claimed. The applications seek judgment to be entered for the applicant against the respondent for various amounts being the sums taxed and certified by the Deputy Registrar as due to the applicant together with interest thereon. The applicant also prays for costs of the applications. The applicant's argument is that in High Court Misc. Civil applications No. 375 of 2016, the respondent's instructions were for representing it in CMCC No. 3404 of 2010 between **Municipal Council of Mombasa vs Anaj Warehouse Limited**. The applicant's costs were taxed at Kshs. 477,727.30 on 17<sup>th</sup> August, 2016. A certificate of taxation was issued on 19<sup>th</sup> August, 2016.

2. In HC. Misc. Civil application No. 420 of 2016, it is stated by the applicant that it was instructed by the respondent to represent it in Mombasa HCC No. 236 of 2011 (JR), **Republic vs Municipal Council of Mombasa and Senior Resident Magistrate's Court, Mombasa and Dhanjal Investments Limited, ex-parte**. The applicant's costs were taxed at Kshs. 415,259.16 on 31<sup>st</sup> August, 2016. A certificate of costs was issued on 8th September, 2016.

3. In HC. Misc. application No. 492 of 2016, the applicant states that it was instructed by the respondent to represent it in Mombasa Misc. Civil application No. 103 of 2012, **Republic vs Municipal Council of Mombasa ex-parte Bronson Hare Chogo & 4 Others**. The applicant's costs were taxed at Kshs. 14,111,709 on 28<sup>th</sup> September, 2016. A certificate of taxation was issued on 14<sup>th</sup> October, 2016. All the applications were supported by affidavits of the applicant sworn on 9th December, 2016.

4. The respondent filed replying affidavits on 8th March, 2017 in respect to the 3 applications, whose contents are similar in nature. The applicant filed supplementary affidavits on 10<sup>th</sup> March, 2017 which are also similar in nature.

5. In his submissions, Mr. Chamwanda for the applicant stated that the respondent has not filed a

reference against the certificates of costs and prayed for judgment to be entered against the respondent and for a decree to issue. He cited the case of **Muri Mwaniki & Wamiti Advocates vs John Ngigi Nganga & Ruth Muthoni Ngigi** where the court cited the case of **Kagwimi Kang'ethe & Co. Advocates vs Penelope Combos & Another** [2014] eKLR.

6. Counsel referred to paragraph 5 of the replying affidavits which state that the application herein is fatally defective as no suit has been filed. Mr. Chamwanda asserted that the applications are properly before the court and any defect does not go to the root of the claim and justice should not be defeated by the said reason.

7. On the authority availed by Counsel for the respondent, to wit **Ahmednasir Abdikadir & Company Advocates vs National Bank of Kenya Limited** [2007] eKLR, Mr. Chamwanda submitted that the said decision was decided in the year 2009 before the 2010 Constitution came into force, when courts were relying on procedural technicalities. He urged this court not to be bound by technicalities. In the said case the Judge said that a demand must have been made. He stated that communication was made demanding for payment of the claim herein. He prayed for the applications to be allowed.

8. On his part, Mr. Abed for the respondent relied on the replying affidavits sworn by Jimmy Waliuala. On the issue of retainer, Counsel relied on the provisions of Section 51(2) of the Advocates Act which provides that where a retainer is disputed, the court has no powers to enter judgment through the manner the applicant has moved the court. He distinguished the case relied on by Mr. Chamwanda where the retainer was not contested. He stated that the respondent had not instructed the applicant to act for it. He relied on the case of **Ahmednasir Abdikadir & Co. Advocates vs National Bank of Kenya Limited** (supra). He prayed for the applications to be dismissed.

9. Section 51 (2) of the Advocates Act provides as follows:-

***The Certificate of the taxing master 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 costs covered thereby, and the court may take such order in relation thereto as it thinks fit, including, in a case where a retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.***

10. In the case of **Macharia Njeru Advocate v Communications Commission of Kenya, HCCC NO. 1029 OF 2002, Njagi J. at p.12** stated as follows:-

***“Counsel for the Defendant argued that since the matter had been referred to a judge under Rule 11 of the Advocates (Remuneration) Order, there was a dispute as to the amount. Unfortunately this view does not enjoy the support of any provision in the law. For one, reference of the matter to a judge does not constitute a setting aside of the certificate, nor does it amount to an alteration of the certificate. The words of Section 51 (2) are very clear. Since the certificate has neither been set aside nor altered by the court and since there has been no order of stay, it is as clear as daylight that this certificate is final as to amount of costs covered thereby. And seeing that it is final as to amount, it cannot be said at the same time that there is a dispute as to that amount. Saying so would amount to a contradiction of express and mandatory statutory provisions.***

***In these circumstances, I find that the Plaintiff's claim is in respect of a liquidated demand and it is plain and obvious that the Defendant is truly and justly indebted to the Plaintiff as certified in the certificate of costs. I also find no triable issue in respect of that certificate which derives its sanctity from law itself.***

11. I have thoroughly perused the affidavits filed by the respondent. Nowhere is it indicated that they did not instruct the applicant. Mr. Abed was therefore giving evidence from the bar when he contested the issue of a retainer. In paragraph 3 of the replying affidavits, the respondent through Jimmy Waliuala avers that the entire suit is misconceived, incompetent, frivolous and an abuse of the court process as they have not had the opportunity to contest the judgment of the Honourable court seeking the respondent to pay the

applicant the amounts in issue, as certified by the Deputy Registrar. A perusal of the taxation proceedings before the Deputy Registrar reveal that the respondent **failed to attend court despite having been notified of the date for taxation of the bill of costs. Secondly, if the respondent felt that no fees was due to the Advocates on the basis of an agreement between it and them, it could have filed a suit for a declaration to that effect even before the said bill was taxed or it could have sought stay orders in the suit. The** respondent was also at liberty to file a reference to the High Court to contest the taxation of the bill of costs but it did not. It is too late in the day for it to raise an argument on a matter that squarely fell within its powers.

12. It is therefore my finding from the totality of the affidavit evidence laid before me that the issue of a retainer was not a central issue to the facts relied upon by the respondent in its affidavit but became a peripheral issue at submission stage. The said submission is far fetched and without merit.

13. I am persuaded by the authority of **Muri Mwaniki & Wamiti Advocates vs John Ngigi Nganga & Another** (supra), cited by Mr. Chamwanda. The upshot of the foregoing is that I enter Judgment in favour of the applicant as against the respondent as follows:

(i) In Mombasa Misc. HCC Misc. Civil application No. 375 of 2016, for the sum of Kshs. 477,727.30;

(ii) In Mombasa HCC misc. Civil application No. 420 of 2016, for the sum of Kshs. 415,259.16;

(iii) In Mombasa HCC Misc. Civil application No. 492 of 2016; for the sum of Kshs. 14,111,709/=; and

(iv) Costs and interest at court rates are awarded to the applicant.

**DELIVERED, DATED and SIGNED at MOMBASA on this 14<sup>th</sup> day of July, 2017.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Malombo for the applicant

No appearance for the respondent

Mr. Oliver Musundi - Court Assistant