



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION NO. 170 OF 2015
KENNETH KARANJA KIBATHI
T/A KIBATHI & COMPANY ADVOCATES.....APPLICANT
VERSUS
GIBSON REUBEN WAMWEA NGURE.....RESPONDENT
RULING

1. This ruling is the outcome of two applications namely: the motion dated 15.12.2015 and the chamber summons dated 02.02.2016. In the motion dated 15.12.2015, Gibson Reuben Wamwea Nguni the respondent herein, sought for the following orders inter alia:

- 1. THAT the firm of R. W. Kuria & Co. Advocates be granted leave to come on record for the respondent.***
- 2. THAT the certificate of costs relating to the applicant's bill of costs taxed on 16th November 2015 be reviewed, set aside or altered.***
- 3. THAT this honourable court do give credit for the sum of ksh.231,600 which the respondent had already paid to the applicant.***
- 4. THAT costs of this application be provided for.***

2. In the summons dated 2nd February 2016 Kenneth Karanja Kibathi T/A Kibathi & Co. Advocates asked for the following orders inter alia:

- 1. THAT the court be pleased to order the amount certified on the certificate of taxation herein dated 18th January, 2016 be entered as judgment against the respondent.***
- 2. THAT a decree issues in respect of the certificate of taxation dated 18th January, 2016 and that the applicant be at liberty to execute for recovery of the same in such manner as a decree of this honourable court.***
- 3. THAT costs of this application be provided for.***

3. When the two applications came up for inter partes hearing, learned counsels recorded a consent order

to have the two applications heard together. They further agreed to have them dispose of by written submissions. A critical examination of the two applications will reveal that the orders sought in the motion dated 15.12.2015 if allowed will substantively affect the prayers sought in the summons dated 2nd February 2016. In the circumstances it is important to first consider the motion. The respondent has simply beseeched this court to review the taxation undertaken by the taxing officer which found the respondent owing to the applicant a sum of ksh.232,172/= being the applicant's costs. The respondent has annexed to the affidavit filed in support of the motion that he had paid to the applicant an amount totalling kshs,231,600/= hence what is due to the applicant is ksh.572/=. The applicant in his replying affidavit admits that he was paid the aforesaid sum but avers that the payments were in respect of various instructions and fees and not limited to this matter. The applicant has however raised a preliminary objection as against the motion on the basis that the respondent has never raised an objection against the taxation to date hence he is barred from challenging the same under paragraph 11(1) and (2) of the Advocates (Remuneration) Order. The respondent is of the view that owing to the lacuna in the Advocates (Remuneration) Order by not prescribing the procedure for the court's intervention, the respondent was right to claim for credit to be given for fees already paid.

4. The respondent's motion is rather unique because it is a reference **stricto sensu**. The motion is premised under Section 51(2) of the Advocates Act and Section 13A of the Advocates (Remuneration) Order and Article 159 of the constitution. It is not in dispute that the applicant's Bill of Costs dated 14.05.2015 was taxed at ksh.232,172 on 16.11.2015. The respondent who was represented by counsel participated throughout the taxation proceedings. No objection has so far been raised against the manner the taxation was conducted as envisaged under paragraph 11 of the Advocates (Remuneration) Order.

5. I have already outlined the kind of orders the respondent has prayed for in the motion. He has asked this court to review and set aside the certificate of costs taxed on 16.11.2015. He has urged this court to take into account the payments he has already made to the applicant. In my humble view what the respondent is indirectly saying is that the taxing officer should have factored what he had paid the applicant prior to the filing of the bill of costs. He admits that he and his advocate inadvertently forgot to bring this fact to the attention of the taxing officer. In other words, the respondent is asking this court to make an order to set off the outstanding debt.

6. In my humble view, I do not think the motion should be entertained so as to affect a taxation properly conducted. It is admitted that the decision on taxation has not been challenged. What is sought to be impugned is the amount to be paid to the applicant.

7. I think the same can only be entertained at the time of dealing with an application seeking to have the taxed costs entered as a judgment or while defending a suit for recovery of costs. I therefore find that to the extent that the motion seeks to impugn the taxation process leading to the issuance of certificate costs, the motion is improperly and incompetently before this court. This is because the same does not comply with the mandatory procedure laid down in paragraph 11 of Advocates (Remuneration) Order.

8. I would have actually ordered for the motion to be dismissed or struck out but I have at the back of my mind the summons dated 2.2.2016 in which the applicant is basically seeking for the entry of judgement in terms of the certificate of costs dated 18.1.2016. The applicant is also seeking for leave to immediately execute the resultant decree to recover the decretal sum.

9. I earlier indicated that learned counsels recorded a consent order to have the two applications heard together. In broad interest of justice I will treat the respondent's motion dated 15.12.2015 as a response to the applicant's summons dated 2nd February 2016. I have already stated the applicant is seeking for entry of judgement in terms of the certificate of costs and for execution of the resultant decree. In the motion dated 15.12.2015, the respondent is saying that he has already paid the applicant his fees to the tune of ksh.231,600/=. He has annexed to his affidavit sworn on 15.12.2015 and filed in support of the motion copies of receipts issued by the applicant acknowledging receipt of the aforesaid payments. I have carefully perused the affidavit of Kenneth Karanja Kibathi sworn on 2nd February 2016 and filed to oppose the motion dated 15.12.2015. The applicant admits that he received the aforesaid sum but he avers that the alleged receipts were for various instructions and legal fees he raised which not limited to

the subject matter of the taxation. With respect, I agree with the applicant that some of the receipts are in respect of work other than the subject matter of this taxation.

10. A close scrutiny of those receipts will reveal that the following Receipts are specifically in respect of this matter:

- i. Receipt no 331 dated 20/3/2013 kshs.5,000/=
- (Opening file fees)
- ii. Receipt no. 321 dated 21.5.2013 ksh.81,600/=
- (legal fees deposit/s. Power of attorney)
- iii. Receipt no. 003 dated 24.3.2015 ksh.5,000/=
- (Legal fees)
- iv. Receipt no. 007 dated 24.4.2015 ksh.15,000/=
- (Legal fees)
- v. Receipt no. 120 dated 22.5.2015 ksh.45,000/=
- (Legal fees & attendances)
- Total fees paid ksh.151,600/=

11. It is therefore only fair to credit the respondent with the amount He has already paid to the applicant.

12. Consequently, I enter judgment in favour of the applicant in the sum of ksh.232,172 as prayed in the summons dated 2.2.2016 less the sum already paid of ksh.151,600. In the circumstances of this case I think a fair order on costs is to direct each party to bear his own costs.

13. For avoidance of doubt, the amount payable to the applicant is ascertained as follows:

- i. Certificate of taxed costs ksh.232,172
- ii. Less amount already paid ksh.151,600
- Net amount payable ksh.80,572/=**

14. Consequently judgment is entered in favour of Kibathi & Co. Advocates in the sum of ksh.80,572/=

15. The respondent to pay the aforesaid amount within 15 days in default the applicant is at liberty to commence execution proceedings for recovery.

Dated, Signed and Delivered in open court this 8th day of April, 2016

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent