



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION 26 OF 2014 (OS)

INVESCO ASSURANCE CO. LTD.....PLAINTIFF/APPLICANT

VERSUS

V.W.MAINA T/A

V . W MAINA & COMPANY ADVOCATES.....DEFENDANT/RESPONDENT

R U L I N G

1. By an originating summons dated 10th February, 2014 the Plaintiff sought orders that:-

(I) THAT the Defendant do render a detailed account of monies paid in all matters assigned to her by the Plaintiff in legal fees as more particularly set out in the Affidavit in support thereof.

(II) THAT fees paid to the Defendant under global scheme (lump sum payment) be allocated to specific fee notes which are due and outstanding.

(III) THAT the Defendant to reimburse / or refund monies overpaid/or which the Defendant is not entitled to being in excess of the lawfully chargeable fees.

(Iv) THAT the Defendant be restrained from filing /or taxing any Bills of Cost pending the taking of accounts.

(v) THAT this Honourable Court be pleased to make such order / or direction as it may deem fit, just and fair to grant.

(vi) THAT the Plaintiff be granted costs of this Cause.

2. The foundation of the originating summons is that the advocate /client relationship between the two has broken down and the Advocate/Defendant has sought to recover fees by taxation and sums have been certified as due and owing. However the client/plaintiff contends in the summons that there is no sum owing as the client had unknowingly overpaid to the advocate the sum of Kshs.2,587,859. For that reason the client/plaint seeks an order for accounts to be rendered by the defendant/advocate.

3. Simultaneous with the application was filed a Notice of Motion dated 10.2.2014 which sought orders that:-

(a) THAT this application be certified as urgent and service thereof be dispensed with in the

first instance.

(b) THAT pending the hearing and determination of this application, there be a stay of execution of the judgment/decree in all recovery actions commenced against the Plaintiff/Applicant herein emanating from the Miscellaneous Applications highlighted in the Statement of Account.

(c) THAT pending the hearing and determination of the Originating Summons filed herein, there be a stay of execution of the judgment /decree in all recovery actions commenced against the plaintiff/Applicant herein emanating from the Miscellaneous Applications highlighted in the Statement of Account.

(d) THAT the Defendant be restrained from filing / or taxing any Bills of Cost pending the taking of accounts.

(e) THAT the costs of this application be in the cause.

4. The summons is supported by an affidavit of Paul Gichuhi whose gist is that the Advocates defendant ought to be stopped from taxing her costs and seeking to enforce any resultant certificates on the basis that the client had overpaid the Advocates to a tune of Kshs.2,587,859 for which the client seeks reimbursement.

5. In opposition to the originating summons and the applications by Notice of Motion the Defendant/Advocate filed two replying affidavits sworn before B.W. Kenzi on the 1/4/2014 and 9/4/2014 which exhibited among other documents, correspondence between the parties, and a certificate of costs. In his opposition to both the originating summons and the Notice of Motion, the Advocate contends that the dispute between the parties touching on costs and recovery thereof was not available for determination on this suit.

6. The advocate additionally filed a Notice of Motion under order 2 Rule 15 seeking that the originating summons be struck out on grounds among others that the court lacks jurisdiction to entertain it.

7. To the Notice of Motion by the Advocate /Defendant the Client /Plaintiff filed a replying affidavit by one CAROLYNE SHAVULIMO who described herself as the legal manager of the Plaintiff/ Client. In that Replying Affidavit the client seems to depart from its pleading that the advocate had been overpaid and now asserted that according to it, the advocate is owed kshs.4,861,394 and not kshs.6,342,194 as demanded by the advocate. To the client therefore the dispute is not on the taxed costs per se but on the question of accounts between the parties.

8. By courts orders of 30.9.2015 the two applications were directed to be heard together and a single determination rendered. Pursuant to that direction, the defendant filed written submissions on 29.5.2015 while the plaintiff did so on 27.7.2015 and the parties attended court on 15/12/2016 to highlight the submissions.

9. At highlighting the plaintiff was represented by Mr. Wairagu while the defendant was represented by Mr. Nyabincha. It was Mr. Nyabincha who took the chance to begin by pointing out that under section 51 of the Advocate Act, a certificate of costs unless set aside is final and that the only avenue of challenge was by reference and therefore this suit is frivolous and vexatious and otherwise an abuse of the court process. The propriety of this suit is questioned with the contention that the taxation was undertaken with the participation of the plaintiff/client and there being certificates the only avenue for challenge is by a reference which the client/plaintiff has not opted for. It is added that in bringing this suit the plaintiff is only keen to craftily vex and scandalise the defendant and by same token abuse the court process.

10. On the plaintiffs application for stay and injunction Mr. Nyabincha Advocate submitted that there was no material to show that any payments had been made and that the plaintiffs was making case for the defendant to prove a case against itself. In conclusion Mr. Nyabincha submitted that the plaintiff has not

been rendered remediless as there was still a window to set aside the taxed costs by an advocates against a client by reference under Rule 11 of the Advocate Remuneration order. The second ground of attack on the originating summons was that under section 34 of the Civil Procedure Act all proceedings relating to execution must be undertaken in the matter in which they arose and not by a separate suit. It was his position that questions raised in these proceedings ought to have been raised in the various miscellaneous application and not otherwise. He reiterated the written submissions and prayed that the originating summons be struck out.

11. In response, Mr. Wairegi contended, while reiterating the written submissions, that the suit was not a challenge to taxation and the resultant certificates of costs but to establish the monies paid by the plaintiff to the defendant and to reconcile same with any sums claimed by the defendant. It was his submissions that the plaintiff did not have any documents to show how much the defendant had been paid.

Analysis and determination

12. Having read the two applications, the originating summons, the affidavits filed together with submissions, I have come to the conclusion that there are only two issues for determination being:-

- **Is the originating summons properly taken?**
- **Where should the issues of accounts, in the circumstances of this matter, be canvassed?**

13. It is added that the issues of accounts raises triable issues and cited the case of SAID HAMAD -VS- D.T.B. Of KENYA LTD. on striking out being a remedy of last resort and should be resorted to sparingly. On section 34 of the Act, Mr. Wairegi submitted that it does not lie as this suit does not challenge certificate of costs. That submission cannot be candid at all. Not on the face of prayers 2, 3 & 4 seeking stay and restraint of execution.

14. Preliminarily and from the onset, this court takes the view that whether or not there is money due to the Defendant/Advocate from the Plaintiff/Client and vice versa is to this court what ought to have been raised and determined before the taxing master. I say it ought to have been determined there because at taxation a client is entitled to file documents and contend that the fees has been paid in full or in part.

15. To say that a client or indeed the advocate can participate at taxation and fail to disclose to the taxing officer sums of money allegedly paid or received only to file a fresh suit and seek to address questions of payment between it and the Advocate prior of taxation is to this court a practice that ought to be discouraged as flying on the face of sections 1A & 1B as read with section 34 Civil Procedure Act which dictate that disputes be determined in a proportionate, cost effective and efficient manner and militate against filing fresh suits to forestall or further execution in concluded files.

In the instant case even if the question of accounts was not taken at taxation the client may still raise same when the Advocate seeks to convert the Certificates into decrees but not by a new and separate suit.

16. Semantics and arguments aside, the plaintiffs grievance can be stated to be that the defendant is seeking to recover from it taxed costs. The suit was founded on the plaintiffs contention that there were money paid by the plaintiff to the defendant which have not been taken into account at taxation including deposits of fees and that the plaintiff lacked records from which to reconstruct the accounting documents.

17. In such a case, the section 3A of the Act clearly mandates the court to make orders to stop such a litigant on its tracks. The plaintiff in this matter is reminded of its obligations to court and by such reminder is told in no uncertain terms that misuse of courts resource in time is abhorred and detested. In this courts view to seek to duplicate suits or seek to determine one issue in a multi-faceted approach by different suit is frowned upon by the clear provisions of section 1A, 1B, 3A 3 B 6, 7 & 34 of the Act. If those were not explicit enough then section 51(2) of the Advocates Act leave no doubt when it provides that:-

“A certificate of 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 costs covered thereby and the court...”

18. Once the 100 certificates of costs were issued as exhibited, only the court as defined under the Advocates Act and Rules under it, can upset it. The process of challenging such a certificate is only by a reference not by a suit pretended to be on accounts and challenging the sum due to the advocate.

19. Equally section 34 of the Civil Procedure Act is explicit that all questions concerning the satisfaction of a decree shall be in the court executing the decree and not in a separate suit.

20. I have said enough to underscore the fact that all litigants need to approach the court within the confines of the law and meet their obligations. A deviation must be corrected by the court if not for anything but for the fidelity to the law and orderly discharge of courts mandate. I fault the propriety of the originating summons filed herein, find that it was improperly filed in contravention of the law and it stands to be struck out. I proceed to strike it out with costs.

21. Having done so, it would be meaningless to address the plaintiff's application that was founded upon the originating summons. It goes with the foundation and it is equally dismissed with costs.

Dated, signed and delivered this 7th June 2016

in the presence of:-

No appearance for the client/plaintiff.

Kalimbo for the Advocate/ defendant.

P.J.O. OTIENO

JUDGE