



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NUMBER 604 OF 2014

CONSOLIDATED WITH MISC. APPLICATION NUMBER 600,601, 602 AND 603 OF 2014

KENYARIRI & ASSOCIATES ADVOCATES.....ADVOCATES/APPLICANT

VERSUS

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

RULING

1. The Applicant filed the application dated 24th September, 2015 where they prayed for orders that: -

a) That judgment be entered herein pursuant to Section 51(2) of the Advocates Act Chapter 16 laws of Kenya in favour of the Applicant and as against the Respondent for a total sum taxed of ksh.1,040,718/- as indicated in the Certificates of Taxation issued by the taxing officer of this Honourable Court on the 8th day of September, 2015.

b) The Applicant be at liberty to execute against the Respondent upon the said certificate of costs without further proceedings.

c) Costs of this application be provided for.

2. The Respondent in response filed a replying affidavit dated 4th July, 2016. In its response, the Respondent deponed that the Applicant was an advocate in the bank's panel of external advocates who was engaged from time to time to handle litigation matters on behalf of the bank. It further stated that the court entered judgment for payment of cumulative sum of Ksh.1,040,718/- which taxed amount has partly been paid to the Applicant. In particular, it claimed that it paid Ksh.415,938.65/- on 7th June, 2016. The Respondent swore further that taxation of the bill proceeded ex parte without its input hence it had no opportunity to respond to the various Bill of Costs for the 5 matters consolidated herein. It claimed, therefore that it lacked the opportunity to demonstrate to the court that it had settled some of the legal fees. It further deponed that save for Misc. application No. 604 of 2014, in which the claim for fees relates to, it had paid fees in respect of other matters subject of taxation in a cumulative sum of Ksh.624,779.35 yet no credit for this amount had been given in the filed bill of costs.

3. During the inter partes hearing on 6th July, 2016, the Applicant submitted that a certificate of taxation was issued and it is final as per Section 51 (1) of the Advocates Act. They argued that there is no application presently in court for setting aside the Certificate of Taxation or asking for accounts. They further claimed that the replying affidavit was filed outside the period ordered by the court. They averred that they have not filed a Bill of Costs for CMCC No. 11234 of 2004 and as such, the Bill of Costs filed herein is purely for Misc. 604/2014 which arises from Civil Appeal No. 422 of 2010. They insisted that

Misc. 603 of 2014 was the one that was consolidated with others. They further contended that the Replying affidavit filed by the Respondent is not responding to their application as required but instead, it seeks to commence taxation and this court has no jurisdiction to do so. They concluded that the authorities cited by the Respondent are not applicable in the current case.

4. The Respondent on its part argued that the Applicant did not respond to what is deponed in the replying affidavit by filing a further affidavit. It added that the Applicant should have put in, a supplementary affidavit and having failed to do so, then the court should consider the Replying affidavit in its entirety. He submitted that a sum of Ksh.415,938.65 has already been paid. It further argued that under Section 51(2) of the Advocates Act, the court is not bound to enter judgment prayed for and as entered in the certificate of taxation especially where proof is adduced that some amounts have been paid already, totaling to Ksh.672,429/- which the Applicant does not dispute.

5. In a nutshell, the Applicant is praying for judgment for a total sum taxed at Ksh.1,040,758/-. The Respondent on the other hand claims that it has already paid a total sum of Ksh.672,429/- which should be deducted from the sum of Ksh.1,040,758/-. In their submission, the Applicant claims that under Section 51(2), Certificate of Taxation is final and as such, judgment should be entered as prayed.

6. It is not in contention that the Bill of Costs was taxed and the applicant was issued with a Certificate of Taxation. It is also not in contention that the Respondent was not present during the proceedings before Taxing Officer when the Bill of Costs was taxed. What is in contention is the amount of Ksh.1,040,718 that was taxed which the Respondent claims did not factor in the sums of money already paid to the Applicant.

7. According to the annexures produced by the Applicant, the Certificate of Taxation was issued in 4 matters being Misc. Application No. 600 of 2014 taxed at Ksh.146,892/-, 601 of 2014 taxed at ksh.276,795/-, 602 of 2014 taxed at Ksh.203,601/-, 603 of 2014 taxed at Ksh.146,893/- and 604 of 2014 taxed at Ksh.266,537/- This brings the total to Ksh.1,040,718/- The Respondent did not participate in the taxation proceedings that resulted to the taxed amount, it also has not brought a reference under Rule 11 of the Remuneration Order, to challenge the taxed amount. It has however pleaded with this court to consider that there were some sums of money already paid to the Applicant and despite the fact that there is no reference filed, the court should not close its eyes and allow the application that contains an anomaly.

8. Whereas there is no reference before the court as provided under Rule 11 of the Remuneration Order, there is an application before the court seeking entry of judgment for the taxed amount of Ksh.1,040,718/- and whereas there is a certificate of taxation of the total sum, there is a contention as to how that amount was arrived at. The respondent who did not participate in the taxation proceedings claims that the Applicant failed to inform the court that some money had been paid before the court could tax the bill, which is evident from the Bill of Costs filed in the 4 matters.

9. In my view, if that is the case, whether there is a reference or not, the court ought to consider this contention as it would be unjust to force the Respondent to pay more fees to the Applicant than he is lawfully entitled to.

10. The Respondent claims that it paid the Applicant a sum of Ksh.415,938.65 as at 7th June, 2016. It has attached a correspondence dated 7th June, 2016 being a forwarding letter in support of the cheque of Ksh.415,398.65 paid to the Applicant for **Nairobi Misc. Application No. 604 of 2014 consolidated with 600, 601, 602, 603 all of 2014) Kenyariri & Associates Advocates Vs the Bank**. This amount was admitted by the Applicant. A further breakdown of the payment as presented by the Respondent is in paragraph 15 of its replying affidavit which reveals that in Misc. Application 603 of 2014 a total sum of Ksh.133,225/- was paid to the applicant on 2nd December, 2004. A further sum of Ksh.130,944/- was directly credited into the Applicant's account No.0102032141300 held with the Respondent on 2^{3rd} December, 2008. Correspondences on the payment of this fee note show that the Applicant was paid Ksh.130,944/- in HCCC No. 10 of 2005 which gave rise to Misc. Application No. 603 of 2014.

11. A closer look at the Respondent's annexures, reveals that in HCCC 10 of 2015, which is the Misc. Application 603 of 2014, a sum total of Ksh.146,893/- was paid to the Applicant in respect of his Bill of Costs filed in court on 25th October, 2013.

12. In Misc. application No. 602 of 2014 arising from HCCC No. 826 of 2001, the Respondent's claims to have paid the Applicant a sum of Ksh.64,650/-, by way of a direct credit to the Applicant's account. It has annexed a credit advice dated 8th September, 2006, for the sum of Ksh.64,650/-, a forwarding letter dated 9th September, 2006 and a statement of accounts in respect of the applicant's account.

13. In HCCC No. 450 of 2000, that gave rise to Miscellaneous application No. 601 of 2014, the applicant was paid Ksh.81,850/- on 28th March, 2006. In the same matter a further sum of Ksh.35,103/- was paid.

14. In CMCC No. 1234 of 2004 that gave rise to Miscellaneous application No. 600 of 2014, the Applicant was paid Ksh.63,363/- on 28th February, 2007 before filing the Bill of Costs which cheque the Applicant sent someone to pick. Therefore, it is apparent that the Respondent's claim has some basis.

15. The Respondent may not be asking for setting aside of the taxation, but it seeks the payments already made to be considered which I think is only just. In any case, no prejudice will be suffered by applicant since he is in receipt of legal fees already paid by the Respondent. The Applicant did not file a supplementary affidavit to respond to the breakdown of payments made to them as laid out in the Replying affidavit. A further look at the matters which gave rise to the Bill of Cost filed and the taxed amount, it is clear that the Respondent has restricted itself to the suits where costs were taxed by the taxing officer. Contrary to the averments by the Applicant that they had not filed Bill of Costs in CMCC No. 11234 of 2004, the bill was filed by the Applicant and taxed in Misc. Application No. 600 of 2014. The Applicant failed to disclose those material facts to the taxing officer and the taxation proceeded ex parte.

16. In the end, it is likely that a substantial amount was paid by the Respondent to the Applicant to cover their legal fees. Looking at the Bill of Costs filed in court, they do not reflect the amount paid in each matter which payment was required to be disclosed by the Applicant and deducted in the Bill of Cost. Despite the fact that there is no reference filed in this court, it would amount to injustice on the part of the Respondent, if he is ordered to pay the total sum of Ksh.1,040,718/- yet it claims that some payments were made in respect of the suits filed therein. The applicant should not benefit twice.

17. Section 51 (2) of the Advocates 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 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.”

18. In my view, the provision does not make it mandatory for the court to enter judgment upon an application being made by the Applicant. In fact, it leaves it at the discretion of the court to make such order in relation thereto as it thinks fit including an order that judgment be entered for the sum certified to be due with costs where the retainer is not disputed.

19. With regard to the contention by the applicant that the replying affidavit was filed outside the time ordered by the court, this court exercises its discretion to admit the same out of time in the wider interest of justice.

20. In the premises aforesaid, and in the interest of justice and Article 159 (2) of the Constitution this court do order that the file be remitted back to the Taxing Officer for purposes only of taking accounts as to what monies if any the Respondent had paid to the Applicant towards the settlement of legal fees with regard to the matters in respect of which the application herein relates.

Dated, signed and delivered at Nairobi this 6th day of October, 2016.

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L NJUGUNA

JUDGE

In the presence

..... *for the Advocate/Applicant*

..... *for the Client/Respondent*