



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
MISC. CIVIL APPLICATION NO. 102 OF 2013
IN THE MATTER OF AN ADVOCATE

AND

IN THE MATTER OF THE ADVOCATES ACT CAP 16 L.O.K

AND

IN THE MATTER OF THE ADVOCATES (REMUNERATION ORDER (2009))

BETWEEN

OUMA NJOGA AND COMPANY ADVOCATESADVOCATE/RESPONDENT

VERSUS

RAPHAEL OKETCH OGONJI CLIENT/APPLICANT

RULING

The Advocate/Respondent represented the Client/Applicant in Nyando SRMCC No. 162 of 2010. According to the Client/Applicant they disagreed and the Advocate/Respondent filed a Bill of Costs which was subsequently taxed at Kshs.82,630/= and a certificate of costs dated 20th December 2013 issued. On 15th February 2014 the Advocate/Respondent filed an application under Section 51(2) of the Advocates Act for judgment to be entered in terms of that certificate of costs. On 14th May 2014 representatives of the Advocate's and Client's Advocates attended the registry and fixed that application for hearing on 23d July 2014. Come that day there was no attendance for the Client/Applicant and as the application was not opposed this Court allowed thus effectively entering judgment for the Advocate/Respondent for a sum of Kshs.82,630/= plus interest at Court rates from 28th November 2013 until payment in full. Five days later on 28th July 2014 the Client/Applicant filed the present application. His prayers as set out in the Further Amended Notice of Motion dated 30th March 2015 and filed herein on even date are:-

"1. Spent

2. Spent

3. That the honourable Court be pleased to set aside, vary and review its orders/judgment issued on 23/7/2014.

4. That the honourable Court be pleased to refer the matter back to the deputy registrar

with direction on proper manner of the assessment of advocate bill of cost.

5. By way of an alternative this honourable Court be pleased to tax the cost in accordance with the law.

6. That the Court be pleased to extend time filing this reference.

7. Cost of application be provided for." (Sic)

The application is premised on the following grounds:-

"(a) The applicant is aggrieved by the judgment and orders of the Court made on 23/7/2014 and have filed a notice to act in person.

(b) This Court granted stay of execution for 30 days which has since lapsed.

(c) The deputy registrar made an error in principle in failing to appreciate the applicable law under which he ought to have based his assessment in view of the nature of transaction if the respondent only represented in the advocate remuneration order at interlocutory stage of the suit read not the entire suit.

(d) The entire handling of the bill was erroneous, arbitrary and based on wrong principle of law.

(e) That the Court be pleased to extend time for filing this reference.

(f) That my reference is on the following grounds:

(i) The ruling of deputy registrar has no basis in the law on various items.

(ii) The deputy registrar made an error of principle by failing to appreciate that the applicable law under which he ought to have based his assessment in view of the nature of transaction in the advocate remuneration order.

(g) This application meets the criteria for the grant of the orders sought.

(h) It is in the interest of justice that this application DATED at KISUMU this 8th day of October 2014."

In response the Advocate/Respondent filed the following Grounds of Opposition:-

"1. THAT the application is bad in law, lacks merit and amounts to an abuse of the Court process and should be dismissed with costs.

2. THAT prior to the entry of judgment herein the applicant was represented by the firm of Amondi & Company Advocates.

3. THAT taxation took place and a certificate of costs extracted and to date retainer is not disputed.

4. THAT the application is incapable of being granted in the manner sought.

5. THAT no useful purpose would be served allowing the application as presented."

Parties agreed to canvass the application by way of written submissions. Although the Court was under the impression that submissions had been received from both sides only those of the

Client/Applicant are on record. The Client/Applicant has cited several decisions in support of his application. In his submissions he has raised several questions which I have considered carefully but sadly come to the conclusion that his application has no merit for the following reasons:- First, paragraph 11 of the Advocates Remuneration Order sets out the procedure for objections to decisions on taxation. Paragraph 11(1) provides that a party wishing to object may within fourteen days after the decision give notice to the taxing officer of the items to which he objects. Paragraph 11(2) requires that the taxing officer shall then give the reasons for his decision forthwith after which the party wishing to object may then within fourteen days of getting the reasons file a reference. The rule requires the Objector to set out the grounds of his objection in the reference. This was obviously not done and being aware of the time limit the Client/Applicant has applied for enlargement of time to file his reference. He is entitled to do so under Paragraph 11(4) which gives this Court power in its discretion to enlarge the time fixed under sub-paragraph 1 or 2. However as he himself has submitted that discretion must be exercised judicially. It is my finding however that he has not demonstrated any reason that would warrant this Court to exercise its discretion in his favour. He all along admits that he was represented at the taxation and blames his Advocate for not complying with the time fixed in sub-paragraph 1 and 2. I have read through his affidavit and submissions again and again but nowhere does he state that he in fact instructed his Advocate to request for the reasons and to thereafter object to the decision. If he was aggrieved by the taxation it was incumbent upon him to instruct his Advocate to file a reference which he did not. His application is clearly an after thought. In any event even were this Court to exercise its discretion in his favour and extend the time for filing the reference and I must state that he has canvassed this application as if he had already been granted leave, his application would still not succeed. To begin with he has not pointed out the items of taxation to which he objects. In fact he has made no reference to any items in the bill of costs. He merely asks this Court to remit the bill to the taxing officer for proper assessment. The law requires that he indicates the items he objects to and give his reasons for so doing. Without this the Court cannot tell why he objects to the decision of the taxing officer. It cannot be that the Advocate/Respondent was not entitled to anything after representing him.

As for the alleged agreement between him and the Advocate/Respondent such agreements are provided for under Section 45 of the Advocates Act which states:

"(1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may:

(a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;

(b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in Court or both;

(c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof;

and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf....." (Underlining mine).

As can be seen from the proviso such an agreement is only valid and binding if it is in writing and signed by the Client or his agent. The Client/Applicant concedes that the agreement between him and the Advocate/Respondent was verbal. That is not a valid agreement under the law.

It is not binding and it cannot be a ground to set aside the certificate of costs. Section 51(2) of the Advocates Act provides that the certificate of the taxing officer by whom any bill has been taxed shall be final as to the amount of costs covered thereby unless it is set aside or altered by the Court, where Court means the High Court. It is for that reason that this Court entered judgment on 23rd July 2014. Retainer was and has even now not been disputed. Indeed the Client/ Applicant has in his pleadings and submissions admitted the retainer. It is noteworthy that the date for the Advocate/Respondent's

application was fixed with the consent of the Client/Applicant's Advocate who did not however turn up. There were no grounds of opposition or a replying affidavit filed to that application and the Court therefore properly concluded that the application was not opposed and proceeded to allow it. No good reasons have been given to this Court to set aside that judgment. The applicant has quoted the law correctly and cited several authorities in support of his submissions and might as well have complied with paragraph 11(2) of the Advocates Remuneration Order by setting out the items he objects to and why. As I have stated the verbal agreement he alludes to is not valid or binding either on himself or the Advocate/Respondent and cannot form the basis of setting aside the judgment.

Accordingly his application is dismissed and as costs follow the event he shall bear the costs.

Signed, dated and delivered at Kisumu this5th... day of ...November... 2015

E. N. MAINA

JUDGE

In presence of:-

In person for Client/Applicant

Mr. Indimuli for Advocate/Respondent

CA: Felix Magutu