



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC. CASE NO.698 OF 2011

IN THE MATTER OF THE ADVOCATES ACT

AND

IN THE ADVOCATES REMUNERATION ORDER

AND

IN THE MATTER OF THE ADVOCATES CLIENT BILL OF COSTS

SINGH GITAU ADVOCATES.....ADVOCATE

VERSUS

CITY FINANCE BANK LIMITED.....CLIENT

J U D G M E N T

1. This matter was argued as a test case for three others. These are HC Misc. Nos.468 of 2011, 116 of 2011 and 834 of 2011. Since the facts and the law in all the cases were the same, the parties agreed that the issue of liability decided in this case be applied in the other cases save that the quantum in those other cases are different and are to be considered separately.
2. The Application before me is a Notice of Motion dated 3rd December, 2012 under Section 51(2) of the Advocates Act, Cap. 16 of the Laws of Kenya and Order 50 Rule 1 of the Civil Procedure Rules. It seeks Judgment for the Advocate as against the Client for a sum of Kshs.89,624/72 being the certified costs due to the Advocate after taxation of his Bill of Costs by the Deputy Registrar together with interest thereon from 16th November, 2011 thereon. The grounds of the application are set out on the face of the application.
3. The application is also supported by the Supporting Affidavit and Further Affidavit of James Gitau Singh, Advocate sworn on 3rd December, 2012 and 21st February, 2013, respectively. It is averred that the Advocate was retained by the Client to represent in the sale of LR No.10901/218 which was sold for Kshs.2,500,000/- that the bill of Costs of the client was was taxed at Kshs.89,624/71 on 16th August, 2011. A certificate of taxation was issued with regard to the said amount. It was also deposed that an appeal against the award was dismissed by Ogola J on 3rd July, 2012. With regard to the Claim of the outstanding rent of Kshs.20,256,315/87 claimed by the Client, it is contended by the Advocate that the same is a disputed claim and that the issue is best ventilated by way of a separate suit rather than in the instant application. Further, it was contended that the Client vide a letter dated 16th March, 2011, demanded for Kshs.1,665,925/34 as rent

outstanding as of 28th February, 2011 and that this figure was in contradiction of what is now being demanded as outstanding rent by the Client. Further, with regard to the arrangement of the advocate retaining 25% of the total sums recovered on behalf of the Client, the Advocate contends that this was an arrangement reached by the parties when the Bank was placed under Statutory Management. The Advocate further contended that in some meeting, the parties had agreed on 24th March, 2009 that a global amount of Kshs.22, 000,000/= plus V.A.T would be paid to the Advocates as legal fees owed. That however, the parties did not reach an agreement on the aforesaid figure and consequently the Client agreed that it would make payments of the outstanding legal fees pursuant to taxation. In the foregoing, the advocate contends that the Client cannot rely on an agreement with regard to payment of legal fees which it did not honour.

4. The application stands opposed vide a Replying Affidavit of Fred Chumo sworn on 5th February, 2013 and filed on the same day. It is contended that before the Court enters Judgment it is essential to determine whether there is a clear case for entry of Judgment as sought. It was averred that the Advocate was indeed retained to undertake recovery or defence of various matters on behalf of the Client. It was also contended that the Advocate's firm was a tenant of the Client bank for a period of six years since 1st January, 2006. The Client contended that there was change of management at the Client Bank and that from then on, the Advocates refused to pay rent and demanded that the same be offset from the outstanding legal fees. However, the Client contends that the Advocate owed it substantial amounts of rent and the same together with service charge, stood at Kshs.20,256, 315/87.
5. The client also contended there was no legal fees payable to the Advocates as both parties had an agreement to the effect that the Advocates would receive 25% of every sum recovered on behalf of the Client and the Advocate would thus not be paid any legal fees. It is therefore the Clients contention that the Advocate resciled from the said agreement by the filing of the various Bill of Costs. The client was of the opinion that the matters it has raised should be investigated in a proper suit. It is accordingly contended that the manner in which the advocate has sought to obtain Judgment and enforce costs is unfair and unjust to the client and will deny it the opportunity to interrogate the claim. The Client further took issue with the taxation, contending that the taxing officer merely assessed legal fees payable as opposed to also assessing the Advocates liability to the Client in terms of what is owed, an issue that is yet to be determined. The Client in conclusion contended that the award is manifestly high accordingly resulting to the filing of a reference on the Taxing Masters decision.
6. I have considered the Affidavits on record, the submissions of counsel and the various authorities relied on.
7. The Application was brought through Section 51 (2) of the Advocates which provides that:-

“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 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 the costs.” (Emphasis mine)

8. In my understanding, this section gives the court the discretion to enter judgment for taxed costs where two conditions are satisfied. The first being that there must be a certificate of the taxing officer by whom the bill has been taxed which certificate has not been set aside or varied by the court. Secondly, where there is no dispute as to the retainer. If those two conditions are satisfied, the court has the “discretion” to enter judgment for the sum certified to be due with costs.
9. In the application before me there is a valid certificate of taxation dated 29th November, 2012 that is on record. The same has not been varied or set aside. Secondly, there is no dispute as to retainer. Whereby a retainer is a set of instructions by a client to an advocate to represent the client or to offer particular legal services to a client in a particular matter or generally. The Client has not denied that the Advocate was retained to offer legal services in respect of the sale of LR No.10901/218 which was sold at Kshs.2,500,000/-. The main dispute is that since the client is claiming rent from the Advocate, Judgment should not be entered at this stage. It is common ground that the advocate had been a tenant of the client for a period of time. The Client contends that it is owed rent in arrears to a tune of Kshs. 20,256,315/87. The Advocate however, denies this

claim. In the foregoing, the central issue of determination before me is therefore, whether under Section 51 (2) of the Advocates Act Cap 16 Laws of Kenya, can a claim for Rent against an Advocate by a Client can act as a hindrance to an Advocate from obtaining Judgment?

10. I have already set out the conditions that need to be satisfied under Section 51 (2) of the Advocates Act. I am doubtful if a debt by an Advocate to his Client for say rent arrears, or such other debt that is unrelated to his employment as an Advocate qua advocate can amount to a dispute as to retainer under that section. I agree with the Advocate's submission that this is not the proper forum to ventilate the issue of arrears in rent between the parties. Indeed, there seems to be a dispute on that rent. Whether or not the claim for rent by the Client is plausible in my view, is not a matter to be adjudicated in a claim by an Advocate for his fees. The Client should institute a suit to recover the arrears in rent that is allegedly owed by the Advocate. I agree with Ogola J in Misc. Cause No. 709 of 2011 Singh Gitau Advocates –vs- City Finance Bank Limited where he was faced with the same issue and he succinctly put it that:-

“As regards the issue of outstanding rent, the respondent can claim the same in another forum but not in the current application for judgment for costs. The Respondent had an option to counterclaim but they did not.”

I say no more than what the judge said. It is clear in my mind that the Client's opposition to the Judgment sought cannot succeed based on the issue of the outstanding rent.

11. With regard to the parties' agreement on the Advocate retaining 25% of any recoveries made on behalf of the client as opposed to payment of fees, I hold that the same should have been canvassed before the Taxing Master or during the reference on taxation to the Court. It is imprudent on the part of the Client to raise an issue as to payment of legal fees at this stage. In any event, I doubt the legality under the Advocates Act of any agreement for payment of legal fees to an Advocate based on contingent basis. See Section 46 of the Advocates Act, CAP 16 Laws of Kenya. In any event, that agreement if it existed was not produced.

12. Accordingly, on the issue of liability, I enter judgment against the Client accordingly. The Notice of Motion dated 3rd December, 2011 is meritorious and is therefore allowed. Judgment be and is hereby entered for the advocate for the sum of Kshs.89,624/72 being the certified costs due. That the Client does pay the applicant interest on the certified costs at 14 % per annum with effect from 20th December, 2011 till payment in full. The Advocate shall also have the costs of this Application.

DATED and DELIVERED at Nairobi this 12th day of April, 2013

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A. MABEYA

JUDGE