



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

MISCELLANEOUS APPLICATION NO. 51 OF 2015

ONDABU & COMPANY ADVOCATESAPPLICANT

VERSUS

JULIE KISAKA.....RESPONDENT

RULING

It is unfortunate that this simple application filed way back on 20th March 2017 has escalated upto the Office of the Registrar Supreme Court and the Office of the Registrar Environment & Land Court in Nairobi ending up in a long explanation by the Deputy Registrar Hon. E. N. Mwenda dated 17th October 2018.

The long and short of all this is that on 14th September 2016, the bill of costs herein was taxed by **HON. C. L. YALWALA (DEPUTY REGISTRAR)** in the sum of Kshs. 316,419/= and a Certificate of Costs was issued accordingly.

The Respondent was aggrieved with the assessment of costs and filed an application dated 3rd November 2016 seeking, inter alia, an order to set aside and review the order on taxation. That was prayer **NO 3** of the said application. In a ruling dated 20th January 2017, **HON. C. L. YALWALA** delivered himself as follows with respect to the said application:-

“In the premises, prayer 3 of the Respondent/Applicant’s application dated 3.11.2016 seeking to review and set aside the order of taxation dated 14/9/2016 is disallowed and the entire application is dismissed.”

The Hon. Deputy Registrar nonetheless proceeded to set aside the execution process. Having **“dismissed the entire application”**, it is not clear how the Hon. Deputy Registrar could again have proceeded to make any other further orders because the **“entire”** application dated 3rd November 2016 had been **“dismissed.”** The import of the ruling dated 20th January 2017 is that the Certificate of Costs as taxed on 14th September 2016 was not disturbed and remains in force.

Emboldened by that ruling, **JOHN ONDABU ADVOCATE** (Applicant herein) filed a Notice of Motion dated 20th March 2017 seeking the main prayer that Judgment be entered against **JULIE KISAKA** (the Respondent herein) in the said sum of Kshs. 316,419/=. The said application was premised on the grounds set out therein and is supported by the affidavit of **JOHN ONDABU ADVOCATE**.

The gravamen of the said application is that the Applicant’s costs having been taxed at Kshs. 316,419/=: he cannot execute until a Judgment is entered in his favour.

The application is contested and in her Replying Affidavit dated 25th April 2017 the Respondent has deponed, inter alia that since the taxation was set aside, there can be no Judgment entered against her. Further, that the Applicant can only file a suit to recover costs. In any event, the Respondent fully paid the costs and even over-paid and so she does not owe the Applicant any money. She added that infact, it is the Applicant who owes her a refund.

For some reasons which are fully captured in the letter by **HON. E. N. MWENDA**, this Court’s Deputy Registrar, dated 17th October 2018, the application was not heard. It ended up before **HON. E. N. MWENDA** on 12th July 2017 and he declined jurisdiction rightly so.

When it was placed before me on 21st November, 2018, it was agreed by Counsel that it be canvassed by way of written submissions which have now been filed.

I have considered the application, the rival affidavits and submissions by both **MR ONDABU** and **MR SITUMA**.

Section 51(2) of the **ADVOCATE’S ACT (CHAPTER 16 LAWS OF KENYA)** provides that:-

“The Certificate of the taxing offices 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 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.”

It cannot be true therefore, as alleged by the Respondent, that the Applicant can only file a suit to recover his costs. The provision of **Section 51(2) of the ADVOCATES ACT** cited above do not provide for that procedure. As to whether or not the Respondent has in fact over-paid the Applicant, that is not really a matter that is before me now. The application to review the taxed costs was heard and dismissed by **HON. YALWALA** and no reference was filed against that Certificate as provided for under **Rule 11 of the Advocates Remuneration Order**. Its therefore rather late in the day to complain about any over-payments having been made to the Applicant in respect to his fees.

The up-shot of the above is that the Applicant’s Notice of Motion dated 20th March 2017 is allowed as prayed.

Boaz N. Olao.

J U D G E

30th May 2019.

Ruling dated, delivered and signed in Open Court this 30th day of May 2019 at Bungoma.

Mr Kundu for Respondent present

Ms Natwati for Mr Ondabu for the Applicant present

Joy/Felix – Court Assistants – present

Boaz N. Olao.

J U D G E

30th May 2019.