



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MISC APPLICATION NO. 30 & 31 OF 2014

ANDREW BARNEY KHAKULA T/A

J.S KHAKULA & CO ADVOCATES.....APPLICANT

=VERSUS=

TRANQUILITY DEVELOPMENT LIMITED..... RESPONDENT

RULING

1. This ruling relates to a notice of motion dated 2/7/2017 through which Mr Andrew Barney Khakula t/a J S Khakula & Co. Advocates (the **applicant**) seeks judgment against M/s Tranquility Development Limited (the **respondent**) under Section 51(2) of the Advocates Act consequent upon a certificate of taxation issued by the taxing officer of this court on 18/5/2016. The application is supported by an affidavit sworn by Andrew B Khakula on 30/6/2017 and a supplementary affidavit sworn on 2/02/2018. The respondent opposed the application through a replying affidavit sworn by Zoher Hussein Pirbhai on 25/02/2018.

2. The applicant deponed that he received instructions from the respondent to represent it in two suits, namely, Nairobi ELC No 708 of 2013 and Nairobi ELC No 878 of 2014. He deponed further that the aforementioned suits formed the basis of the advocate/client bill of costs which was taxed by the taxing officer of this court. He added that the respondent filed a reference, to wit, Milimani High Court (Commercial Division) Misc App No 267 of 2014 which was dismissed with costs. He contends that the respondent's conduct shows that it does not intend to pay the taxed costs.

3. The respondent's case is that it challenged the award of the taxing officer through a reference dated 16/05/16 but the court on 30/06/2017 dismissed the same. It further contends that the respondent filed an appeal seeking to set aside the said decision of the High Court. It states that there was no resolution passed by the respondent for the applicant to represent it on the aforementioned matters and the issue of retainer was not addressed. It further contends that the applicant intends to fraudulently obtain money from the respondent without a justifiable cause. It adds that the respondent has an arguable appeal which is pending hearing and it will be rendered nugatory if this application is allowed. It further contends that the respondent stands to suffer prejudice and irreparable loss if the application is allowed.

4. The applicant filed his submissions on 22/02/2018 and submitted that for a court to enter judgment under Section 51(2) of the Advocates Act, there must be a certificate of taxed costs and there should be no dispute on retainer. He further submitted that costs were taxed by the taxing officer and a certificate of costs was issued on 18/05/16. He added that the said certificate of costs has neither been set aside nor settled by the respondent. He added that if there were an appeal, the record would show. He further submitted that even if an appeal or reference had been filed that alone cannot stop this court from entering judgment. He stated that the respondent retained him in the aforementioned suits. He stated further that if there was any dispute on retainer, it was to be dealt with before taxation. He urged the court to disregard the respondent's allegations that there was dispute about retainer. He relied on the case of **George Ndungu Kimani T/A Kimani & Co Advocates Vs Ronald Schaich (2013) eKLR; Kithi & Compnay Vs Menengai Downs Ltd (2015) eKLR; Njeru Nyaga & Co Advocates Vs George Ngure Kariuki (2014) eKLR ;and Omulele & Tollo Advocates Vs Mount Holdings Limited (2016) eKLR.**

5. The respondent filed its submissions on 12/03/18. It submitted that the court has power to enter judgment upon a certificate of taxation if an applicant shows that the retainer has not been disputed and the certificate of costs has not been set aside or settled. It relied on Section 51 (2) of the Advocates Act and the case of **Ahmednasir Abdikadir & Co Advocates V National bank of Kenya Limited (2006) eKLR; Nairobi and HC Misc of 2012 E.W Njeru & Co Advocates Vs Zakhem construction (K) Limited; and HC Misc 487 of 2012 E.W Njeru Vs Zakhem Construction (K) Limited.** It made reference to **Black's Law Dictionary, 6th Edition 1990 and Halsbury Laws of England, 4th Edition** on the definition of "retainer" and submitted that the emails and cheques provided by the applicant are not conclusive evidence of retainer. It further argued that it gave instructions to the applicant to act for it in various matters but not in the two matters in question. It added that there is no single document signed by it or by its duly authorized agent to constitute a retainer and that Section 51(2) of the Advocates Act does not entitle the applicant to a judgment hence the application should fail.

6. The single issue for determination in this application is whether the application satisfies the criteria for grant of judgment on a certificate of costs under Section 51 of the Advocates Acts.

7. **Section 51(2) of the Advocates Act** 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 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.

8. **In Lubulellah & Associates Advocates v N K Brothers Limited [2014] eKLR**, the court held that the law is very clear that once a taxing officer has taxed the costs and issued a certificate of costs and there is no reference against the taxing officer's ruling or there has been a reference and a determination has been made on the reference, no other action would be required from the court save to enter judgment. **In Omulele & Tollo Advocates v Magnum Properties Limited [2016] eKLR** the court held that a retainer need not be in writing and can be inferred from the conduct of the parties or the circumstances of the case.

9. The respondent opposed the present application on two grounds: lack of retainer; and existence of an appeal against the order dismissing the respondent's reference. The issue of retainer was raised by the respondent before the taxing officer and the taxing officer made the following finding in paragraph 2 of page 7 of her ruling.

On the other items in the bill, I am satisfied that the applicant offered the services to the respondent. I proceed to tax the bill as follows

10. The court record before me does not disclose the filing of any reference and/or appeal against any ruling made in the matter before me. Similarly, it does not disclose any notice of objection filed and served under Paragraph 11 of the Advocates Remuneration Order. The court has not been furnished with any stay order or any order granting the respondents leave to appeal, upon which the court would withhold entry of judgment. Although Zoher Hussein Pirbhai alluded to a memorandum of appeal, none was annexed to his replying affidavit. Without saying much, no materials have been placed before this court by the respondent to warrant withholding of judgment. It is my view and holding that a party challenging the taxing officer's award on the ground of lack of retainer is required to promptly utilize the mechanism provided under Paragraph 11 of the Advocates Remuneration Order and procure appropriate instruments and orders that would form the basis for opposing an application for entry of judgment. These instruments and orders include objection notice, reference, stay order etc. To raise the issue of retainer without evidence of appropriate steps taken to utilize the mechanism in Paragraph 11 of the Advocates Remuneration Order is not sufficient ground for withholding the advocate's access to the award made in his favour.

11. In light of the foregoing, the court is satisfied that the applicant has met the criteria for entry of judgment under Section 51 of the Advocates Act. Consequently, the Notice of Motion dated 2/7/2017 is allowed in terms of prayers 1 and 2. The applicant shall have costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF JULY 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr Mulomi holding brief for Mr Khakula Advocate for the Applicant

Mr Munyendo holding brief for Mr Osundwa for the Respondent

Ms Halima Abdi - Court Clerk