



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI JJA)

CIVIL APPEAL NO. 14 OF 2014

BETWEEN

OTIENO YOGO & COMPANY ADVOCATES..... APPELLANTS

AND

EQUITY BANK LIMITED..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisumu (Chemitei, J.)

dated 26th November, 2013

in

H.C.C.MISC. NO. 174 OF 2012

JUDGMENT OF THE COURT

The appeal before us is brought by *M/s Otieno Yogo & Co.*, a firm of advocates, against the ruling of the High Court (*Chemitei, J.*) dated 26th November, 2013. By that ruling, the learned Judge held in abeyance the advocates' application dated 26th March, 2013 in which they had sought to convert into a judgment and decree the certificate of costs issued in the proceedings on 11th March, 2013 in the sum of Kshs.279,798.02 against their erstwhile clients, Equity Bank Ltd, (*“the client”*). The learned Judge made that order because he had allowed another application dated 10th October, 2012 in Misc. Application No.173 of 2012 in favour of the client. That order was introduced in this appeal by way of a supplementary record of appeal lodged by the client. The learned Judge allowed the application in terms of prayers 2, 3 and 4 thereof. Those prayers were expressed as follows:-

“2. This Honourable Court be pleased to stay taxation of the bills of costs in the matters below pending the hearing and determination of this application that is;

(i) Misc. Application No. 173 of 2012

(ii) Misc. Application No. 174 of 2012

3. ***The bills of costs referred to above be consolidated for purposes of this application.***
4. ***The bills of costs referred to be stayed and matters be referred to arbitration.***
5. ***The Applicant be ordered to supply the Respondent with the current position of all the matters which give rise to the Bills of costs.”***

It is plain beyond peradventure that the decision in Misc Application No. 173 of 2012 affected Misc Application No. 174 of 2012 in which the advocates sought judgment in terms of the Certificate of Taxation. We have no evidence that the decision in Misc 173 of 2012 has been set aside, reviewed or is the subject of any appeal. It is significant that the same Judge who was being asked to enter judgment in terms of the certificate of costs is the same one who had allowed the client's application in Misc Application No. 173 of 2012.

Whatever the merits or demerits of the orders of the learned Judge in Misc Application No 173 of 2012, those orders are not the subject of this appeal.

The orders remain valid and enforceable unless set aside on appeal or reviewed by the same Court. With all due respect to the advocates, the orders made in Misc Application No. 173 of 2012 cannot be challenged in this appeal. In that regard, the authorities cited to us on arbitration are not helpful.

The decision appealed against concerned the advocates' application made before the High Court under the provisions of **Section 51 (2)** of the Advocates' Act which is in the following terms:-

“51

0. ***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 with costs.”***

Our understanding of the above provisions is that the court retains the discretion to or not to enter judgment for the sum indicated in the certificate of taxation. Some of the primary considerations to be made include a determination of whether the certificate has been set aside or altered by the Court and whether the retainer is disputed. Even where the certificate has not been set aside or altered or the retainer is not disputed, it does not follow that judgment will be entered for the sum on the certificate of taxation by the mere say so. The court can still make **“such Order in relation thereto as it thinks fit..”**

In the matter before us, the learned Judge wrongly or correctly had just allowed the client's application staying taxation of bills of costs in various Misc Applications including the Misc Application in which judgment for the sum in the Certificate of Taxation was sought. In our view, the order made by the learned Judge in Misc Application No. 173 of 2012 was a proper matter to be considered as affecting or likely to affect the advocates' application for judgment in terms of the certificate of Taxation. It is also our view that the order of the learned Judge keeping in abeyance the matter before him i.e. Misc Application No. 174 of 2012 pending arbitration was within his discretion to make. The order was not made on whim or caprice. We also detect no misdirection on the part of the learned judge. It is our finding therefore that this appeal has no merit and we order that it be and is hereby dismissed.

Before penning off, we wish briefly to mention an issue raised by counsel for the client at the tail end of his submissions that this appeal is incompetent as it is founded on a Notice of Appeal which was filed outside the prescribed time without the leave of the court. We indeed note that the Notice of Appeal in this record was lodged on 28th November, 2013. It is in respect of the decision given on 26th November, 2013. This appeal was lodged on 14th March, 2014. In our view, having filed the Notice of Appeal on 26th November, 2013, the appellants should have, under the provisions of **rule 82 (1)**, lodged their appeal within 60 days of the lodging of the Notice of Appeal. On the face of it, even if we take account of excluded days, this appeal was lodged way out of time. We have not been able to trace a

certificate of delay issued by the Deputy Registrar of the High Court under the proviso to **rule 82 (1)** of this Court's Rules. **Prima facie** therefore, this appeal was filed out of time without leave.

In the premises had we not found for the client on merit, we would have struck out this appeal for being incompetent as our jurisdiction to entertain the same in the absence of a valid Notice of Appeal in the record is doubtful.

The appeal remains dismissed. We make no order as to costs in view of the parties antecedent relationship.

DATED AND DELIVERED AT KISUMU THIS 10TH DAY OF DECEMBER ,2014

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL