



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

MISC. NO. 6 OF 2016

GITHINJI, KIMAMO & CO. ADVOCATES.....CLAIMANT

-VERSUS-

ENDMOR STEEL MILLERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The application before me is the Notice of Motion dated 1.3.2019. It was brought under section 51(2) of the Advocates Act Cap 16 Laws of Kenya and order 5, Rule 1 of the Civil Procedure Rules 2010 and seeks the following orders:

- a. THAT judgment be entered for the Applicant against the Respondent for the sum of Kshs.82,185 together with interest thereon at 14% per annum from 5th July 2018 until payment in full.
- b. THAT the Applicant be at liberty to execute against the Respondent.
- c. THAT costs of this application be borne by the Respondent.

2. The application is based on the grounds on the body of the motion and the supporting sworn by the Applicant's counsel on 4.3.2019. In brief, the applicant contend that the respondent instructed her to defend her in ELR Cause No. 437 of 2014 and thereafter the applicant filed Advocate Clients Bill of Costs. That on 5.7.2018, the Deputy Registrar of this court determined the costs payable to the Advocate. The applicant prays for judgement to be entered in respect of the determined costs plus interest at 14% from 5.7.2018 when the Ruling on the costs was delivered.

3. The respondent opposed the application by filing grounds of opposition on 20.3.2019. In brief, the respondent contended that the application is frivolous, vexatious and fatally defective. That the applicant ought to have filed a fresh suit since the retainer has always been disputed. As regards the interest on the taxed costs, she contended that it should accrue after expiry of 30 days from the date of service of the Taxed Bill of the Client.

4. The application was disposed of by written submissions. The applicant submitted that his retainer by the respondent to act for her in cause No. 437 of 2014 was never in dispute. He further submitted that his costs were determined by the Deputy Registrar of the Court and under section 51 of the Advocates Act the certificate of costs cannot be set aside or reopened through grounds of opposition. He therefore prayed for judgement to be entered in terms of the said certificate of costs because the same had not been set aside or altered. He relied on **Mwema Kitulu & Co Advocates Vs Obadia Kivuvya [2011]eKLR** and **Kithi & Co. Advocates Vs Menegai Downs Ltd [2015]eKLR**.

5. The respondent submitted that under section 51 (2) of the Advocates Act, the Court can only enter on the basis of certificate of costs if retainer is not disputed. That because retainer herein is disputed, the application for judgement is not properly brought and maintained and that the applicant should file a suit. As regards the interest at 14% on the taxed costs, the respondent submitted that the same is not chargeable because, apart from being exorbitant, the applicant has since the taxation not served a copy of the certificate of costs to her. She relied on **Macharia & Co. Advocates Vs Autherser K. Magugu & Amatter[2015]eKLR** where the court held that interest should not be awarded where the advocate delays to seek judgment after the taxation of a bill of costs.

6. There is no dispute that the applicant filed a bill of costs against the respondent on 30.1.2018 and the same was taxed by the DR of this Court. There is further no dispute that the certificate of costs issued by the DR of the Court has not been set aside or altered. The issues for determination are:

- a. Whether the application is incompetent and fatally defective.
- b. Whether judgment should be entered as prayed in the application
- c. Whether 14% interest should be awarded to the applicant effective from 5.7.2018.

Incompetent and defective application

7. The respondent contended that the application is incompetent because the retainer of the Advocate is disputed. In her view, the applicant should have instead filed a suit for hearing on merits and not to file a miscellaneous application. On the other hand, the applicant contended that retainer has never been in dispute and maintained that the application is properly before the court.

8. I have carefully perused the court record and considered the rival contentions herein. It is clear from the record that during the hearing of the Advocates Client Bill of Costs, the respondent never protested about the retainer. In fact, in her written submissions filed on 21.5.2018 she submitted on the item on instructions fees without raising any objection to the issue of retainer. She even acknowledged that the parties had agreed on instruction fees of Kshs.30,000. In paragraph 7 of the submissions, she started that:

“In any event we submit that the amount of Kshs.30,000 agreed between the parties should be enough on this limb. The same was duly settled. See affidavit of Kenneth Muriithi filed herewith.”

9. In view of the foregoing it is my finding that the respondent has not proved on a balance of probability that the retainer was disputed. I therefore return that the application is properly before the court.

Judgment on the certificate of costs

10. Section 51(2) of the Advocates 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 costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in the case where the retainer is not disputed, an order that judgement be entered for the sum certified to be due with costs.”

11. In view of the finding herein above that the retainer is not in dispute, I proceed to enter judgement for the applicant in terms of the costs certified by the Taxing Officer on 5.7.2018. The applicant is further awarded costs plus interest on the judgment at the rate of 14% from 5.7.2018 as prayed pursuant to Rule 7 of the Advocates (Remuneration) order. The said Rule provides:

“ An advocate may charge interest at 14% per annum on his disbursements and costs, whether by scale or otherwise, from the expiry to one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount has been paid or tendered in full.”

12. The applicant has prayed for interest from the date when the Taxing Officer rendered her ruling on the bill. The respondent has not denied knowledge of the amount of costs certified on 5.7.2018. I therefore award the interest as prayed from 5.7.2018. In doing so I have considered the fact that, there was no unreasonable delay by the applicant before filing the application for judgement after the taxation of his bill by the Deputy Registrar of this court.

Dated, Signed and Delivered in Open Court at Nairobi this 20th day of September, 2019

ONESMUS N. MAKAU

JUDGE