



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 113 OF 2012

AHMED ABUBAKAR MIRAJ.....CLAIMANT

VERSUS

BAMBURI CEMENT.....RESPONDENT

R U L I N G

INTRODUCTION

1. On 6/9/2013 I entered judgment for the claimant in the sum of ksh.3,391,188 plus costs and interest. Thereafter the claimant filed his party and party bill of costs through his advocates, Messers Stephen Odiaga & co. Advocates, which bill was taxed by the Deputy Registrar of this court on 26/6/2015 at ksh.237,522.86. He has now brought the Notice of Motion dated 17/1/2017 through the law firm of Abubakar, Mwanakitina & Co. Advocate seeking the following orders:

- (a) That the honourable court do grant leave to Abubakar, Mwanakitina & co. Advocates to act for the claimant in place of Stephen Odiaga & Co. Advocates after judgment had been delivered.
- (b) That the court do please to grant leave for the time within which an objection and review to the party and party bill of costs dated 25th October, 2013 can be extended.
- (c) That the court to give time within which an objection and review to the party and party bill of costs dated 25th October, 2013 is to be filed.
- (d) The costs of the application.

2. The Motion is supported by the Affidavit sworn by the claimant himself on the 17/1/2017. The grounds for the Motion are that the former Advocate drew an inordinately low bill of costs considering the ksh.791,870.10 awarded to him on 18/6/2015 under his advocate – client bill of costs. According to the claimant Schedule VI B of the Advocates Remuneration Order provides that, the party and party costs in the same suit ought to have been half of the costs awarded in the Advocate-client bill. Finally the claimant is of the view that the delay in failing to file objection within 14 days as required under Rule 11(I) of the Advocates Remuneration Order should be excused because it was not due to his willful neglect. He therefore blames his former advocate for the woes he finds himself in.

3. The respondent has opposed the Motion by the relying Affidavit sworn by the General Counsel, Betty Kanyagia. According to her the claimant's suit was fully litigated and all the ensuing judgment and costs

and interest were fully paid according to the consent order executed by defence as well as the claimant's counsel on 27/6/2015. In her view the said consent is binding on the partners and there is nothing left for determination and the court is now *fuctus officio*. She advises the claimant to seek redress against his former advocate at the Advocates Complaint commission for negligence and poor representation.

4. I granted the leave for the change of Advocates on 7/2/2017 when the Motion was presented to me under certificate of urgency. Thereafter the Motion was heard interpartes on 29/3/2017.

APPLICANT'S CASE

5. Miss Mwangeka, learned counsel for the clamant admitted that the claimant's former Advocate filed party and party costs which was taxed and thereafter a settlement agreement was executed by counsel. She however submitted that although the counsel had authority to enter consent on behalf of the claimant, he acted opposite to the wishes of the client with respect to adequate compensation as regards the delay in filing objection to the costs. The counsel further submitted that such was an error and mistake of the counsel and it should not be visited on the claimant. She submitted that even if the taxed costs have already been paid, the same can be treated as part payment of the costs to be taxed afresh. In her view the delay in bringing the motion is not in ordinate.

RESPONDENT'S CASE

6. Mr. Njeru, learned counsel for the respondent opposed the Motion. He submitted that the claimant was represented by counsel during the taxation of the bill of costs that culminated in the impugned award of costs. He further submitted that after the determination of the costs, no objection was registered and the costs were paid and the counsel for the parties executed a consent dated 27/6/2015 confirming that the suit was fully settled. He urged that the consent order was binding on the parties and it can only be undone on ground of fraud, mistake or misrepresentation. He submitted that the claimant's new counsel should advise his client to seek redress from the Advocates Complaints Commission, if he deems that the former counsel acted negligently. He prayed for the Motion to be dismissed because the suit is fully settled and the court is now *fuctus officio*.

ANALYSIS AND DETERMINATION

7. There is no dispute that the judgment debt, costs and interest awarded herein have since been settled and the Advocates for the parties executed a consent to confirm the said settlement. The issue for determination is whether the claimant should now be given leave for enlargement of the time within which to file objection and review to the bill of costs dated 25/10/2013.

8. I have carefully considered the Motion and the rival affidavits and the oral submissions by the counsel. It is common knowledge that the claimant was duly represented by the counsel throughout the proceedings before me and the Taxing master. He did not register any doubt or professional negligence against his said counsel anytime or anywhere from the time the costs were determined on 16/6/2015 to the time when he filed the present motion on 7/2/2017 is over 20 months.

9. Such period in my view represents an ordained delay compared to the 14 days period given by rule 11 of the Advocates Remuneration Order. No good cause has been shown for such delay on the part of the applicant. I will therefore not excuse it. I agree with the respondent that the proceedings ended after the settlement of the decree, costs and interest, a fact which was confirmed by the agreement executed by the counsel for the two parties on 27/6/2016. The court is now *fuctus officio*. If the claimant feels that his former counsel committed professional negligence to his detriment, he should seek redress through the various fora provided by the law.

DISPOSITION

10. The Notice of Motion dated 17/1/2017 is dismissed for want of merits.

Dated, signed and delivered this 9th June 2017

O. N. Makau

Judge