



Odhiambo Owiti & Company Advocates v Equator Bottlers Limited (Miscellaneous Civil Case 155 of 2020) [2023] KEHC 3949 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3949 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL CASE 155 OF 2020
MS SHARIFF, J
APRIL 27, 2023**

BETWEEN

ODHIAMBO OWITI & COMPANY ADVOCATES ADVOCATE

AND

EQUATOR BOTTLERS LIMITED CLIENT

RULING

Introduction

1. In their notice of motion dated November 17, 2020 and filed on December 3, 2020, the advocates sought orders that this court adopt the certificate of costs issued herein in the sum of Kshs 29,324.90 in respect of the taxation order made on September 30, 2020, as judgment and decree of this court together with interest thereon at fourteen (14%) per cent per annum from October 19, 2017 being one month from the date of presentation of their fee note to the Client, in accordance with the provisions of rule 7 of the *Advocates (Remuneration) Order*, until payment in full.
2. Kennedy O. Owiti, an advocate practicing as a partner in the firm of Odhiambo Owiti & Company Advocates, swore an affidavit on November 17, 2020 on behalf of the advocates in support of the said application herein.
3. It was the advocate's case that the client instructed and retained them to act on its behalf in a non-contentious matter *vide* a letter dated April 7, 2017, in which was to respond to a demand letter that had been served upon the client by a potential plaintiff one Moses Omondi t/a Mama Omondi Shop, which they ably did to its logical conclusion whereupon they forwarded their final fee note in respect of the professional fees to be settled by the client.
4. They averred that the client failed to settle the aforesaid fee note as a result of which they filed their advocate-client bill of costs which was taxed and allowed on September 30, 2020 in the sum of Kshs



- 29,324.90. They stated that a certificate of costs was issued to that effect and the same had not been altered or set aside by the court.
5. They pointed out that they were entitled to interest on costs at the rate of fourteen (14%) per cent per annum from October 19, 2017 being one month from the date of delivery of its fee note to the respondent till payment in full as is contemplated in rule 7 of the amended [Advocates Remuneration Order](#).
 6. When this matter came up for mention to confirm compliance by parties on February 25, 2022, the client indicated that in response to the advocate's application, it had emailed its replying affidavit to court. However, the court noted that the said replying affidavit did not bear a court stamp. The client therefore informed the court that it would proceed on the basis of its written submissions only. This matter was then fixed for ruling on July 26, 2022.
 7. However, on April 5, 2022, the advocate filed an application dated April 4, 2022 seeking leave to file a further affidavit to annex a copy of the client's letter of instructions to them dated April 7, 2017, a copy of the demand letter written by M/S Mwamu & Company Advocates dated February 10, 2017 and a copy of the advocate's letter dated April 26, 2017 showing that they proceeded to act on the client's instructions.
 8. Having been satisfied that a hearing notice had been duly served upon the client but there was no response to the said application and the client did not attend court either physically or virtually, on June 29, 2022, this court allowed the said application as it was unopposed.
 9. On December 1, 2022, the client once again indicated to court that it filed its replying affidavit on December 6, 2021. However, the same was not on the court record. The court then gave directions as to the filing of further affidavits and written submissions by parties.
 10. Kennedy Odhiambo Owiti, swore a further affidavit on July 12, 2022 on behalf of the advocate. The same was filed on July 14, 2022. The advocates reiterated the averments that were contained in his affidavit in support of the application herein to the effect that the advocate responded to the demand letter by M/S Mwamu & Company Advocates dated February 10, 2017 *vide* a letter dated April 26, 2017 in a debt recovery process upon the client's instructions contrary to the client's assertions.
 11. The advocate pointed out that according to rule 7 of the [Advocates Remuneration Order](#), interest was chargeable from the date of expiration of one (1) month from delivery of the bill of costs by the advocate to the client but before the amount of the bill has been paid or tendered in full.
 12. Julius Gicheha, a credit control personnel of the client, swore a further affidavit on behalf of the client on November 1, 2022. The same was filed on November 3, 2022.
 13. The client termed the advocate's further affidavit dated July 12, 2022 as an afterthought as it had had an opportunity to annex all relevant material documents in a supplementary affidavit after it filed its replying affidavit dated December 6, 2021 but failed to do so. It emphasised that the inadvertence on the part of the advocate only crystallised after it filed its written submissions in response to the advocate's submissions which had conclusively addressed the issues in dispute and hence the advocate's failure to file the documents amounted to negligence and not inadvertent mistake as the advocate had misrepresented.
 14. Both parties filed two (2) sets of written submissions. The advocate's first set of written submissions were dated December 1, 2021 and filed on December 2, 2021. The second set of written submissions was dated July 8, 2022 and filed on July 14, 2022. On the other hand, the client first set of written submissions were dated and filed on December 20, 2021 while the second set of written submissions



was dated November 2, 2022 and filed on November 3, 2022. The ruling herein is based on the said written submissions which both parties relied upon in their entirety.

Legal Analysis

15. The advocates submitted that section 51(2) of the *Advocates Act* provides for the conversion of a certificate of costs to a judgment and decree of court where there was no dispute about retainer.
16. They referred to rule 7 of the *Advocates Remuneration Order* and placed reliance on several cases among them the case of *Otieno Ragot & Co Advocates v National Bank of Kenya* [2016] eKLR and that of *Wainaina Ireri & Co Advocates v Kenya Bus Services Limited* [2005] eKLR where the certificates of costs therein were adopted as judgment of court and interest on costs awarded.
17. On the other hand, in its first written submissions, the client, had argued that it did not retain the advocate's services in respect of the action the subject of the taxation. it denied of being aware of the said matter. It pointed out that its mode of retaining the services of advocates was through official letters or emails from an authorised person, which fact the advocates were aware of.
18. It argued that the letter referred to by the advocates dated April 7, 2017 had not been produced before this court. In this regard it placed reliance on section 51(2) of the *Advocates Act* and the case of *Republic v City Council of Nairobi; Ivyland Park Ltd (interested party) Ex parte Inderpal Singh & 2 others Suing as Officials of Convent Drive South Residents' Association* [2021]eKLR where the court held that it was an established position of law that the only reason that a court of law could not enter judgment on a certificate of costs was if the same had been set aside or altered or where there was an issue with retainer.
19. It was its contention that advocates were not entitled to the interest sought. It invoked rule 7 of the *Advocates Remuneration Order* and argued that the document the advocates sent it on September 19, 2017 was a pro forma request note dated September 18, 2017 with a note at the bottom stating that the final fee note may be sent at the completion of the case and that it was not a final bill setting out the disbursements and costs that it was obligated to pay.
20. In this regard, it placed reliance on the case of *Otieno Ragot & Co Advocates vs Kenindia Assurance Co Ltd* [2020]eKLR where the court held that a pro forma invoice did not qualify as a bill under rule 7 of the *Advocates Remuneration Order*.
21. It was emphatic that the court should only exercise its discretion to award interest based on the certificate of costs dated September 30, 2020 as it came to learn of it on December 3, 2020 when served with the application. In this respect, it relied on the case of *Kerongo & Company Advocates v Africa Assurance Merchant Co Limited* [2019] eKLR where Kamau J held that interest would be at court rates from April 6, 2018 when the client had been served with the application in which a copy of the certificate of costs had been annexed as there was no proof that the said certificate had been served upon the client. It nonetheless urged this court to dismiss the present application as it did not retain the advocate.
22. In its submissions on the issue of instructions, urged this court not to accept the documents the advocate filed in its further affidavit as the same would be against the equitable doctrine of laches for the reason that the same was not filed within reasonable time and further, that the same offended the maxim "equity aids the vigilant and not the indolent."
23. Right from the outset, this court found it prudent to determine the issue of whether retainer existed between the advocates and the client before delving into whether the advocates are entitled to the prayer for judgment sought in the application.



24. The value of retainer in the Kenyan context is that it circumscribes the obligations of the advocate to provide professional legal services to his or her client with a substantial legitimate expectation that he would be compensated for the services rendered. The term “client” is defined under section 2 of the *Advocates Act* cap 16 (Laws of Kenya) as:-
- “Any person who, as a principal or on behalf of another or a trustee or personal representative, or any other capacity has power express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs.”
25. In the *Black’s Law Dictionary* 6th Edition 1990, the word “retainer” has been stated to attach the following meaning:-
- “In the practice of Law, when a client hires an attorney to represent him the client is said to have retained the attorney. The act of employment is called the retainer. The retainer agreement between the client and attorney sets forth the nature of services to be performed, costs, expenses and related matters”
26. Section 45 (5) of the *Advocates Act* cap 16 (Laws of Kenya) stipulates that an advocate who is a party to a retainer agreement and who had acted diligently for the client was entitled to sue and recover for the whole retainer fee should his client default in payment thereof.
27. In this regard, this court had due regard to the case of *Omulele & Tollo Advocates v Magnum Properties Limited* [2016] eKLR where it was held that a retainer did not have to be in writing but that the same could be inferred from the conduct of the parties or the circumstances of the case.
28. From the foregoing a retainer denotes a “relationship” between parties and that a retainer per se need not be in writing but that it can be oral or even inferred from conduct of the parties.
29. As with any other agreement, the onus of proving the existence of the retainer lies with the party that wishes to enforce it. This is in line with the ordinary rules of evidence that he who asserts must prove.
30. Notably, the advocate annexed a copy of the client’s letter of instructions dated April 7, 2017 in its further affidavit. As the advocate’s application to introduce the said instruction letter was allowed, the question on whether or not a retainer existed between the advocate and the client herein had therefore been rendered moot.
31. This court noted that on one hand, the client appeared to ask this court to note the date from when interest ought to accrue on the certified costs. It admitted to having been served with a pro forma invoice. This could be implied that it was indeed acknowledging that it had an advocate-client relationship with the advocate herein. On the other hand, it was also seeking to demonstrate that there was no such relationship by locking out evidence for having been presented to this court late.
32. Unfortunately, the client could not rely on technicalities to lock out evidence that established an advocate-client relationship when it did not oppose an application that had sought to establish the said relationship in the first place. Furthermore, there was no evidence that it raised any objections on the said advocate-client relationship during the taxation of the advocate- client’s bill of costs. As was held in the case of *Kenneth Kiplagat t/a Kiplagat & Associates v National Housing Corporation* [2005] eKLR, all objections were required to be raised at the hearing of the bill of costs.
33. The client could not therefore approbate and reprobate. It either had an advocate-client relationship with the advocate or it did not. The advocate furnished this court with the client’s letter of instruction



- to it. This was sufficient proof to demonstrate that there existed an advocate-client relationship between the advocate and the client herein.
34. The client was therefore estopped by its conduct from denying the existence of the advocate’s retainer. Indeed, courts have a duty to disallow clients from failing to pay for services that have been rendered by their advocates.
35. Turning to the issue of whether the certificate of costs should be adopted as a judgment of this court and whether the advocates are entitled to the interest sought, this court had due regard to section 51(2) of the Advocates Act which provides as follows:-
- “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.”
36. Further, rule 7 of the Advocates (Remuneration) Order stipulates that:-
- “An advocate may charge interests at 14% per annum on his disbursement and costs whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, such claim for interests is raised before the amount of the bill has been paid or tendered in full.”
37. It was not in dispute that the certificate of costs that was issued by the taxing officer had not been set aside and/or altered. Further, the client did not appear to have filed any reference under paragraph 11 of the Advocates Remuneration Order to challenge the decision of the said taxing master. In an instance such as this, the court had no other option than to adopt the certificate of costs as a judgment.
38. Several courts have held that the court has the discretion to determine when interest ought to run. This court was agreeable to the authorities cited by parties in respect of this issue. In the case of Otieno Ragot & Company Advocates v Kenya Ports Authority [2017]eKLR, it was held that although rule 7 entitled an advocate to claim interest, the time from when interest would run was not stipulated and was therefore left to the discretion of the court.
39. In the case of D. Njogu & Company Advocates v Kenya National Capital Corporation [2006] eKLR, the court held that interest ought to run from the date the correct fee note was sent to the client irrespective of whether the bill of costs was subsequently reduced on taxation. The court therein explained that the “correct fee note” meant a bill that was in accordance with the terms upon which the advocate had contracted with the client or the bill which the client did not dispute or the bill which was in accordance with the sums awarded by either the taxing officer or by the deputy registrar in a certificate of costs.
40. This court took the view that rule 7 of the Advocates Remuneration Rules was clear that interest was chargeable at fourteen (14%) per cent per annum from the expiration of one (1) month from the delivery of the bill to the client. There was therefore a reference point, from when interest would be calculable. It could not accrue before one month had expired from the time when the bill was delivered to the client.
41. However, interest did not become automatically chargeable after the lapse of the one (1) month from the date when the bill was served. Rule 7 of the Advocates Remuneration Rules provided that interest was only chargeable provided that such claim for interest was raised before the amount of the bill was tendered in full.



42. This court was persuaded with the authorities that were cited by the client herein other courts had held that a pro forma invoice and/or a request note was not a bill in the meaning of rule 7 of the *Advocates Remuneration Order*. Indeed, the pro forma invoice that the advocates forwarded to the client contained different figures from the bill that was subsequently filed and taxed by the taxing officer.
43. If the said pro forma invoice had been identical to the said bill and the warning of fourteen (14%) per cent was contained in both documents, this court would have found the same to have been adequate notification of the amounts due and owing to the advocates by the client herein and deemed it to have provided sufficient information as contemplated in rule 7 of the *Advocates Remuneration Order*.
44. Having said so, it was not clear to this court when the correct bill was submitted to the client for settlement before it was filed because the advocate mainly focused on the said final pro forma request note which was allegedly served on September 18, 2017.
45. Be that as it may, this court had already determined that the taxing officer had indicated at the first hearing of the advocates-client bill of cost, that she was satisfied that the client had been served at the first hearing *vide* the return of service filed in court by the advocates. A perusal of the said return of service on the court record shows that the client was first served with the bill on August 3, 2020.
46. In the absence of any evidence of when the bill of costs was first delivered to the client, this court took the firm view that the client was certainly aware of the advocate-client bill of costs as at August 3, 2020.
47. Bearing in mind the holding of *D. Njogu & Company Advocates v Kenya National Capital Corporation* (supra) which this court fully associated itself with, this court came to the firm conclusion that the one (1) month envisaged in rule 7 of the *Advocates Remuneration Order* lapsed on September 3, 2020. Interest would thus accrue on the certified costs from September 4, 2020.
48. The certified costs became payable as the certificate of costs was not altered or set aside. The claim for payment of fourteen (14%) per cent per annum was raised in the present application and the same was payable.

Disposition

49. The upshot of this court's decision was that the advocate's notice of motion application dated November 17, 2020 and filed on December 3, 2020 was partially merited and the same be and is hereby allowed in the following terms:-
 - a. Judgment be and is hereby entered in favour of the advocate in the sum of Kenya shillings twenty nine thousand, three hundred and twenty four and ninety cents (Kshs 29,324.90) together with interest thereon at fourteen (14%) per cent per annum calculable from September 4, 2020.
 - b. Costs of this application be awarded to the advocate.
50. It is so ordered.

DATED AND SIGNED AT KISUMU THIS 20TH DAY OF APRIL 2023

J. KAMAU

JUDGE

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF APRIL 2023

M. S. SHARIFF



JUDGE

