



**Macharia Njeru t/a Macharia Njeru Advocates v London
Distillers (K) Limited (Miscellaneous Application 632 of 2004)
[2022] KEHC 129 (KLR) (Commercial and Tax) (18 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 129 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 632 OF 2004
A MSHILA, J
FEBRUARY 18, 2022**

**BETWEEN
MACHARIA NJERU T/A MACHARIA NJERU ADVOCATES APPLICANT
AND
LONDON DISTILLERS (K) LIMITED RESPONDENT**

RULING

INTRODUCTION

1. The applicant filed a Notice of Motion dated 22nd March 2019 which was brought under the provisions of Section 51(2) of the *Advocates Act*, Section 3A of the *Civil Procedure Act* and Order 50 Rule 1 of the *Civil Procedure Rules*. The applicant sought the following orders;
 - a. The Court orders that the amount of Kshs.3, 697,798 certified on the Certificate of Taxation dated 14th July 2017 be entered as judgment against the Respondent.
 - b. The taxed costs to attract interest at the rate of 14% per annum from 3rd October 2004 until payment in full.
 - c. The applicant be at liberty to execute against the Respondent.
2. The Application was premised on the grounds on the face of the Application and on the Supporting Affidavit made on the same date by MACHARIA NJERU who deponed that an amended Advocate-Client Bill of Costs dated 26th July 2007 was taxed in the sum of Kshs.3, 697, 798/- by the Taxing Officer on 4th July 2017. A certificate of taxation was issued in the sum of Kshs.3, 697, 798 on 14th July 2017.



3. The Respondent herein filed a Chamber Summons Application dated 17th July 2017 which reference was dismissed with costs in the Ruling of the Court dated 31st January 2019.
4. The applicant prayed for interest from 3rd October 2004, thirty days after service of the Bill of Costs.
5. The parties filed their submissions and are considered hereunder;

APPLICANT'S CASE

6. The applicant submitted that the Respondent claimed to have filed a Notice of Appeal and in the process of filing an Appeal. The Respondent has neither moved this court nor the Appellate Court for issuance of an order for stay of execution. In any event, the court issued a negative order to wit, dismissal of the reference, which is not an order capable of being stayed.
7. Further, the Applicant stated that an Application such as the present Application which seeks for the court to enter judgment for the sum certified in accordance with Section 51(2) of the Advocates Act is an alternative suit for recovery of fees under Section 48. (See: *Mwangi Gitau & Company Advocates versus Esther Wambui Njoroge [2018] eKLR.*)
8. The only bar to judgment being entered under Section 51(2) is when there is a dispute as to retainer. In the present suit, the Respondent in its Replying Affidavit suggested that its contention was that the Advocate did not carry out instructions properly. A dispute as to retainer is an allegation that the advocate was not instructed to act for the Client.
9. The Applicant further contended that this issue of retainer was only raised at this stage when the Applicant is seeking for entry of judgment. By filing a reference challenging only the reasoning and determination on item 3 of the Bill of costs, the Respondent is deemed to have acquiesced that it did indeed instruct the advocate to act for it in Nairobi HCCC No. 184 of 2001. There is therefore no dispute as to retainer.
10. Rule 7 of the Advocates (Remuneration) Order allows an advocate to charge interest at 14% per annum on disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full. The Applicant urged the Court to award interest as prayed and in the alternative to award interest at court rates.

RESPONDENT'S CASE

11. The Respondent stated that being dissatisfied by the decision of the Trial Judge in the reference, the Respondent moved to the Court of Appeal to contest the said decision and filed a Notice of Appeal dated 7th February 2019.
12. Moreover, the Respondent by a letter dated 11th January 2019 requested for copies of typed proceedings to enable it compile the Record of Appeal. In the circumstances this Application is granted and the intended appeal allowed it will result to wastage of judicial time.
13. Consequently, it would be unfair and unjust for the Respondent to be condemned to pay penalties in terms of interest due to the delays occasioned by the Deputy Registrar from 2004 to date.
14. The Respondent while relying on Section 51(2) of the Advocates Act submitted that there is a dispute on the retainer and it ought to have been determined by the Court. Further, the Respondent implored the Court to dismiss the presumption of the finality as to the Certificate of Taxation by not allowing the instant Application pending the hearing and determination of the intended Appeal.



15. On whether the Applicant is entitled to interest as provided under Rule 7 of the Advocates Act, it was the Respondent's contention that despite being served with the Bill of Costs, the Applicant did not make a claim that the interest would accrue at 14% per annum as envisaged.
16. In addition, the Applicant did not furnish the court with any evidence that it claimed interest at 14% per annum and therefore by his omission forfeited the interest sought. (See: *Kerongo & Company Advocates versus Africa Assurance Merchang Co. Limited [2019]*)
17. The Respondent submitted that the only way for the Applicant ought to recover its costs is by filing a suit for recovery. There is no legal basis to request for entry of judgment in the same file where the Application for taxation was filed, once a Certificate of Taxation has been finalized, the Application becomes spent. A fresh suit should be filed for purposes of recovery as provided under Section 48 (2) of the Advocates Act. (See *Cyrus Minda T/A Minda & Co. Advocates versus Yunes Kerubo Oruta [2013] eKLR.*)

ISSUES FOR DETERMINATION

18. After reading the supporting affidavit filed herein this court finds the following issues for determination which is;
 - a. Whether this court ought to stay these proceedings;
 - b. Whether the Applicant ought to have filed a suit for recovery of the taxed costs;
 - c. Whether the conditions of Section 51(2) of the Advocates Act have been satisfied;
 - d. Whether an interest rate at 14% is applicable.

ANALYSIS

Whether this court should stay these proceedings;

19. The Respondent pointed out that it has a pending Intended Appeal and implored the Court to dismiss the presumption of the finality as to the Certificate of Taxation by not allowing the instant application pending the hearing and determination of the intended Appeal. In this regard the Court concurs with the submissions of the Applicant that there is no stay of execution in place that bars the applicant from executing the judgment and decree, that it seeks.
20. It is trite that an Appeal does not operate as stay of execution as provided under Order 42 rule 6(1) and (2) of the Civil Procedure Rules states as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (1) unless –

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and



- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

21. In light of the above provision of the law, as it stands there is no application for stay of execution filed or pending hearing and determination before this court and the Notice of the Intended Appeal cannot and does not act as stay.

Whether the Applicant ought to have filed another suit for recovery?

22. It was the Respondent’s argument that the only way for the Applicant to recover its costs is by filing a suit for recovery. There is no legal basis to request for entry of judgment in the same file where the application for taxation was filed and that, once a Certificate of Taxation has been finalized, the application becomes spent.

23. The applicable law is found at Section 48 of the Advocates Act which provides that;

“ 3) Notwithstanding any other provisions of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed.”

24. In view of the above mentioned provision, this court is satisfied that there is no legal requirement for the applicant to file a fresh suit for recovery of taxed costs.

Whether the conditions of Section 51(2) of the Advocates Act have been satisfied;

25. The present application is anchored on the provisions of Section 51(2) of the Advocates Act which reads 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.”

26. The amended Advocate-Client Bill of Costs dated 26th July 2007 was taxed in the sum of Kshs.3, 697, 798 by the Taxing Officer on 4th July 2017. The Certificate of Taxation was issued in the sum of Kshs.3, 697, 798 on 14th July 2017. Thereafter, the Respondent herein filed a Chamber Summons application dated 17th July 2017 which reference was dismissed with costs in the Judgment of the Court dated 31st January 2019.

27. The respondent submitted that there is a dispute on the retainer and it ought to have been determined by the Court.

28. The Court has looked at the judgment for the above mentioned reference dated 31st January 2019 and it is noteworthy that the issue of the retainer was not in dispute and that the Respondent herein had instructed the Applicant to defend it in HCCC No. 184 of 2001 Seabound Company Limited vs London Distillers (K) Limited. The respondent additionally instructed the applicant to file on its behalf the Counterclaim.

29. It is the Court’s conclusion that there was and there remains no dispute on the retainer.



30. In *Winfred Nyakundi Konosi t/a Konosi & Co. Advocates V. Invesco Assurance Company Ltd. (2018) eKLR*, the court stated that: -

“Once a certificate of costs is issued and has not been set aside or altered, no other action would be required from the court save to enter judgement upon application”

31. The Applicant has satisfied the conditions of Section 51(2) of the Advocates Act. Consequently, the only order which commends itself to this court is to adopt the certificate of taxation dated 14/07/2017 as a judgment of this court made in favour of the applicant for the amount of Kshs.3,697,798/-.

Whether an interest rate at 14% is applicable to the taxed costs;

32. As regards the issue of interest, the applicant has claimed for interest on the taxed amount at the rate of 14% per annum. Rule 7 of the Advocates Remuneration Order provides as follows: -

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

33. The Court has perused the Amended Bill of Costs dated 26th July 2007 that was filed by the Applicant and the court record at length and finds no evidence provided or produced by the Applicant to support its claim that it had raised or notified the respondent on the issue of interest that would be applicable as envisaged in Rule 7 above.

34. As was stated in *Lubulellah & Associates Advocates versus NK Brothers Limited [2014] eKLR*, where an advocate files his Bill of Costs without raising the issue of interest, then it forfeits interest as provided for under Rule 7 of the *Advocates Remuneration Order*.

35. The same position was reiterated in the holding in *Machira & Co. Advocates v Arthur K. Magugu & another [2019] eKLR*, where the Court of Appeal had an occasion to consider an advocate’s entitlement to interest under paragraph 7 of the *Advocates Remuneration* and stated:

“The learned judge found correctly in our view that the appellant did not furnish the court with any evidence that they had claimed interest at fourteen (14%) per annum at least one (1) month before filing the Bill of Costs. The appellant relied on a letter from counsel for the respondent to justify his position that the learned judge should have awarded him interest at 14% from the date of taxation. We note that the said letter refers to the decretal sum claimed while the issue of interest has not been addressed. The appellant did not produce a copy of his firm’s letter of 9th August, 2001 referred to in the respondents’ counsels letter of 20th September, 2001 to support his claim.

Accordingly, we find that the learned judge did not err in finding that the appellant did not furnish the court with any evidence that they had claimed interest at fourteen (14%) per cent at least one (1) month before they filed their Bill of Costs. They were therefore not entitled to interest at 14%.”

36. The import of the above is that the interest on the taxed amount will be forfeited.

FINDINGS AND DETERMINATION

37. In the light of the foregoing this court makes the following findings and determinations;



- (i) This court finds that the Notice of Appeal dated 7th February, 2019 cannot and does not operate as a stay of proceedings or a stay of execution;
- (ii) This court finds that there is no legal requirement for a fresh suit to be filed for the recovery of taxed costs;
- (iii) The application dated 22nd March, 2019 is found to be partially meritorious;
- (iv) The Certificate of Taxation dated 14th July, 2017 is hereby adopted as a Judgment of this court made in favour of the Applicant in the sum of Kshs. 3,697,798/-.
- (v) Interest on the taxed costs at 14% is disallowed;
- (vi) There shall be no order as to costs.

Orders Accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Mr. Mwangi holding brief for Kimani for the Advocate/Applicant

Mr. Ogutu holding brief for Tiego for the Client/Respondent

Lucy-----Court Assistant

