



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**MISCELLANEOUS CIVIL APPLICATION NO 124 OF 2020**

**OTIENO RAGOT & COMPANY ADVOCATES.....ADVOCATE**

**VERSUS**

**NATIONAL BANK OF KENYA.....CLIENT**

**RULING**

**INTRODUCTION**

1. In their Notice of Motion dated 15<sup>th</sup> March 2021 and filed on 30<sup>th</sup> March 2021, the Advocates sought for orders that this court be pleased to adopt the Certificate of Costs issued herein in the sum of Kshs 742,416.76 in relation to the Advocate's Bill of Costs dated 6<sup>th</sup> July 2020 as the judgment and decree of this court. They had also sought an order for the Advocate to be awarded interest on the taxed costs at court rates from 26<sup>th</sup> March 2020 until full payment.
2. David Otieno, an Advocate practicing in the firm of Owiti Otieno & Ragot Advocates, swore an Affidavit on 15<sup>th</sup> March 2021 on behalf of the Advocates in support of the said application herein.
3. It was the Advocates' case that the Client instructed them to act on its behalf in **Kisumu HCCC No 246 of 2001 Getrude Anyango Owiny vs National Bank of Kenya**, vide a letter dated 9<sup>th</sup> July 2001, which they ably did to its logical conclusion whereupon they forwarded their Pro forma invoice dated 24<sup>th</sup> February 2020 in respect of the professional fees to be settled by the Client.
4. They averred that the Client failed to settle the amount in the Pro forma invoice and they therefore filed their Advocate-Client Bill of Costs dated 6<sup>th</sup> July 2020 which was taxed in the sum of Kshs 742,416.76. They stated that a Certificate of Costs was issued on 27<sup>th</sup> November 2020 and the same had not been altered or set aside by the court and further that no reference was pending therefrom.
5. They pointed out that the Client settled the said sum of Kshs 742,416.76 as taxed and that what was outstanding was interest on costs and disbursements at the rate of fourteen (14%) per cent from 26<sup>th</sup> March 2020 being one (1) month from the date of the Pro Forma invoice to the Client as was contemplated in Rule 7 of the Amended Advocates Remuneration Rules.
6. They averred that they could not enforce payment on the outstanding interest unless the Certificate of Costs herein was adopted as judgment of this court and thus urged this court to allow their said application.
7. In opposition to the said application, on 2<sup>nd</sup> June 2021 the Client's Legal Officer, Chrispus Maithya, swore a Replying Affidavit sworn on behalf of the Client herein. The same was filed on 26<sup>th</sup> November 2021.
8. It contended that the said application lacked basis as no material had been presented to warrant the grant of the orders sought and the same ought to be dismissed with costs.
9. It admitted that it instructed the Advocates to represent it in the aforementioned matter and that it settled the Advocates' Final Pro-forma Request Note dated 24<sup>th</sup> February 2020 on 19<sup>th</sup> January 2021. It pointed out that what the Advocate submitted to them was a Final Pro Forma invoice and not a Bill which could accrue interest after one (1) month from the date of delivery of the Bill upon the Client as was envisaged under Section 7 (sic) of the Advocates Remuneration Order.
10. It stated that it was a pre-condition that for the Bill to attract interest, the Bill must have been served upon a Client and that it must have contained a demand for interest in the event that the Bill was not settled within a specified period. It added that the Advocates were therefore not entitled to interest from 2020 as they failed to serve it with a Bill as envisaged by the law and further because they did not intimate their

intention to charge interest in the Bill. It was categorical that the Advocates could only claim interest within the Bill of Costs for assessment by the Taxing Officer when the Bill was being taxed. It contended that the Taxing Officer was *functus officio* having rendered a ruling and hence the Advocates were not at liberty to litigate in piecemeal.

11. It further submitted that the court lacked the requisite jurisdiction to entertain the present application having rendered itself conclusively on the Bill of Costs. It pointed out that the Advocates had not demonstrated the legal basis upon which this application had been brought. It therefore termed the application an afterthought which was not founded on law.

12. It added that this court had the discretion to determine when interest is calculable and invited it to exercise its discretion judiciously.

13. The Advocate's Written Submissions were dated 4<sup>th</sup> November 2021 and filed on 5<sup>th</sup> November 2021 while those of the Client were dated 11<sup>th</sup> November 2021 and filed on 15<sup>th</sup> November 2021.

14. The Ruling herein is based on the said Written Submissions which the parties relied upon in their entirety.

## **LEGAL ANALYSIS**

15. The Advocates submitted that for the Court to entertain an application under Section 51(2) of the Advocates Act Cap 16 (Laws of Kenya), there must be no dispute as to retainer and there must be a certificate which had not been varied and set aside. They added that under Section 51(1) of the Advocates Act, a certificate of costs signed by the taxing officer is final as to the quantum of costs.

16. They contended that the Client's claim that the court lacked jurisdiction and that the taxing officer was *functus officio* was completely misconceived. They argued that this cause being a High Court matter, the taxing officer was an officer of the aforesaid court who had been granted the special mandate to tax the Bill that was filed herein and that her mandate ended when she taxed the said Bill.

17. They were categorical that all proceedings including a reference, variation of a certificate or an application for the conversion of the certificate to a judgment and a decree of the court had to be made before a judge. They invoked Section 51(2) of the Advocates Act pursuant to which the application herein had been filed and Section 2 of the Advocates Act which defines the word, "court".

18. 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 vs National Bank of Kenya [2016] eKLR** and that of **Wainaina Ireri & Co. Advocates vs Kenya Bus Services Limited [2005] eKLR** where it emerged that the document that was required to be served was not the bill of costs as filed or the certificate of costs that was issued after taxation but that it was a demand for payment of fees and disbursements and it did not matter whether it was called, a fee note, an invoice, proforma invoice or a request note. They were emphatic that what the law referred to as a bill was whatever form that was delivered to a client.

19. They submitted that the intention of the Legislature in coming up with a requirement that an advance be served before the institution of proceedings was to encourage parties to settle disputes over fees without recourse to court.

20. They pointed out that an advocate who sued a client without first demanding payment and warning the client of the interest penalty would be denied interest for any period before the proceedings were filed and would only get interest from the time the costs were determined through taxation. They added that similarly, a client who did nothing to resolve a dispute over fees with its advocates by ignoring a demand for fees and a warning that an interest would be charged and allowed the matter to go to court would be charged and/or penalised on interest on the amount that the taxing master would find to be due from the time the demand was delivered to a client to the time payment was made.

21. They stated that the bill was served upon the Client on 26<sup>th</sup> February 2020 and that pointed out that the effect of Rule 7 of the Advocates Remuneration Order was clearly set out on page 3 of the said Pro forma invoice and that the Client's attention was drawn to the same in their letter dated 24<sup>th</sup> February 2020 in which the Bill was forwarded.

22. They contended that the Client's claim that interest should have been dealt with at the point of taxation by the taxing officer was wholly misconceived as once the taxing officer determined the quantum on costs, she became *functus officio* and the High Court then had power to enter judgment as provided under Section 51(2) of the Advocates Act.

23. They were emphatic that interest could only be dealt with at the point of entry of judgment. They added that there can be judgment without interest but there can be no interest without judgment. They argued that they incurred expenses to bring this suit as a result of the Client's attitude. They added that the court's time and public resources had also been wasted in an exercise that would have easily been resolved had the Client conducted itself properly.

24. They were categorical that it was trite law that an advocate appearing for himself or his firm was deemed to have engaged an Advocate. In this regard, they relied on the case of **Muri Mwaniki & Wamiti Advocates vs John Ngigi Nganga & Another [2014]eKLR** where the court held that an advocate is entitled to costs of the application to enforce the Certificate of Costs under Section 51 of the Advocates Act. They urged this court to allow their application as prayed.

25. On the other hand, the Client argued that Rule 7 of the Advocates Remuneration Order was not couched in mandatory terms. It stated that the operative word in the Rule was "may" and therefore, in the circumstances, the court had the discretion to determine when interest became calculable. In this regard, it relied on the case of **Otieno Ragot & Company Advocates vs Kenya Airports Authority [2017]eKLR** where the court held that the time when interest would run was left to the discretion of the court.

26. It was its contention that the document the Advocates sent it on 24<sup>th</sup> February 2020 was a “Final Proforma Request Note” and not a Bill of Costs as envisaged under Rule 7 of the Advocates (Remuneration) Order. It referred to the Black’s Law Dictionary which stated that a proforma invoice or bill constituted an advance document, upon which no legal obligations attached. It added that it was a precursor to the actual invoice or Bill and hence interest was not payable.

27. To buttress its argument, it placed reliance on the case of **Odhiambo Owiti & Co Advocates vs Dominion Farms Limited [2019]eKLR** and the case of **Otieno Ragot & Co Advocates vs Kenindia Assurance Co. Ltd [2020]eKLR** where the common thread was that a pro forma request note was not equivalent to a bill within the meaning of Rule 7 of the Advocates Remuneration Order.

28. It further cited the case of **Jackson Omwenga & Co Advocates vs Everest Enterprises Limited [2017]eKLR** where the court held that an applicant must also prove that he had raised his claim for interest before the amount of the bill had been paid or tendered in full. It argued that the Advocates did not claim for interest when it delivered the Pro forma Invoice to it. It added that even if the said Pro forma invoice had been construed as constituting a Bill interest would not have been chargeable after the expiry of one month because the Advocate did not make any claim of interest.

29. It placed reliance on the case of **D. Njogu & Company Advocates vs Kenya National Capital Corporation [2006] eKLR** where the court held that the date from when interest should be calculable should be pegged to the date when the advocate sends the correct fee note. It was its contention therefore that the date from when the Advocate was entitled to interest on the Bill of Costs dated 6<sup>th</sup> July 2020 was pegged on the date when the Certificate of Costs was issued, being 10<sup>th</sup> December 2021.

30. It further relied on the case of **Otieno Ragot & Co Advocates vs Kenindia Assurance Co Ltd (Supra)** where the court opined that interest does not have to be charged, nor does it automatically become chargeable after the lapse of the one month from the date when the bill was served and the client is given a grace period. In reference to the above point, it argued that it fully paid the costs on 19<sup>th</sup> January 2021 which it contended was just nine (9) days shy of the due date as envisaged in Rule 7 of the Advocates Remuneration Order and which was not an inordinate delay.

31. Section 51(2) of the Advocates Act 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.”**

32. 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.”**

33. Having carefully considered the respective parties’ Written Submissions, it was clear that the Certificate of Costs that was issued by the Taxing Officer had not been set aside and/or altered. Indeed, no reference under Paragraph 11 of the Advocates Remuneration Order challenging the decision of the said Taxing Master was filed. It was also evident that the Client was not opposed to the adoption of the taxed costs as a judgment sum. What it objected was the interest accruing from the date of serving it with the Pro forma Invoice Request Note (sic) to the date of payment of the costs.

34. Notably, 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 vs Kenya Ports Authority (Supra)**, 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.

35. In the case of **D. Njogu & Company Advocates vs Kenya National Capital Corporation (Supra)**, 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.

36. 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.

37. Going further, interest does 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 provides that interest is only chargeable provided that such claim for interest was raised before the amount of the bill was tendered in full.

38. 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 Master.

39. 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 find the Pro Forma invoice 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.

40. 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 they alleged was served on 26<sup>th</sup> February 2020.

41. Be that as it may, this court noted from the proceedings before the Taxing Master that the Client was represented on 26<sup>th</sup> November 2020 when the parties appeared before the said Taxing Master. Even though the Advocate was absent during the delivery of the Ruling on 27<sup>th</sup> November 2020 by the Taxing Master, the Respondent was present.

42. 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 26<sup>th</sup> November 2020. However, the said costs were paid by the Client on 19<sup>th</sup> January 2021.

43. Bearing in mind the holding of **D. Njogu & Company Advocates vs 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 26<sup>th</sup> December 2020. Interest would thus accrue on the certified costs from 26<sup>th</sup> December 2020.

44. The Client's argument that the Advocate had not claimed for interest was immaterial as a reading of the Pro forma Invoice showed that the Advocate had cautioned the Client that Rule 7 of the Advocates Remuneration Order would apply. 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**

45. The upshot of this court's decision was that the Advocate's Notice of Motion application dated 15<sup>th</sup> March 2021 and filed on 30<sup>th</sup> March 2021 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 Seven hundred and forty two thousand, four hundred and sixteen and seventy six cents. (Kshs 742,416.76/-) together with interest thereon at fourteen (14%) per cent per annum calculable after thirty (30) days from the date when application was served upon the Client.**

**b. Costs of this application be awarded to the Advocate.**

46. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF MARCH 2022**

**J. KAMAU**

**JUDGE**