



**Nduati & Co. Advocates v Kenya Orient Insurance Company Limited (Miscellaneous Civil Application E002 of 2020) [2022] KEHC 10267 (KLR) (28 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10267 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
MISCELLANEOUS CIVIL APPLICATION E002 OF 2020**

**F GIKONYO, J  
JUNE 28, 2022**

**BETWEEN**

**NDUATI & CO. ADVOCATES ..... ADVOCATE**

**AND**

**KENYA ORIENT INSURANCE COMPANY LIMITED ..... CLIENT**

**RULING**

1. Before me is a Notice of Motion dated December 15, 2020 which seeks the following orders: -
  - i. Spent
  - ii. That Narok High Court Misc. 2 of 2020 be consolidated together with H.C.Com Misc. Application 3,6,4,5 all of 2020 for the purposes of this application.
  - iii. That the annexed certificates of taxation deemed to have been dully filed and endorsed upon payment of requisite court fees.
  - iv. That the honourable court be pleased to enter judgment in favour of the applicant in terms of the certificates of taxation dated on even dates in the sum of Kshs. 339,502.00/=(three hundred and thirty nine thousand five hundred and two) being an aggregate of the taxed bills taxed as follows; Misc. Application 2/2020.....69,751/=Misc. Application 3/2020.....59,507/=Misc. Application 4/2020.....71,230/=Misc. Application 5/2020.....69,507/=Misc. Application 6/2020.....69,507/= Aggregate.....Kshs. 339, 502.00/=
  - v. That subject to prayer 2 & 3, the honourable court be pleased to issue a decree/judgment above for 339,502.00/= plus interest be provided for at 14% per annum from April 11, 2020 (being 30 days from the date bill of costs was served upon the respondent) until payment in full.



- vi. That the cost of the application be provided for.
2. The application is based on the grounds set out on the face of the application and the supporting affidavit sworn by Stanley Nduati on December 15, 2020.
3. The client/respondent opposed the application vide a replying affidavit sworn by Catherine Kabaru on May 20, 2022.
4. On May 26, 2022, Mr. Malena sought to file a further affidavit on payment and interest applicable. The court allowed the applicant 7 days to file and serve a further affidavit and submissions limited to; i) alleged payment and ii) interest on a bill of costs which constitute new issues in the replying affidavit.
5. The applicant filed a supplementary affidavit sworn by Malela Basil on June 1, 2022. The deponent reiterates the contents of the supporting affidavit. He averred that the affidavit of Maurine Wangeci consists of falsehoods. He insists that the respondent was duly served. The deponent in his supplementary did not address the issues raised in the replying affidavit which the court specifically set out in the leave.
6. The application was canvassed by way of written submissions.

#### **Advocate/Applicant's Submissions.**

7. The applicant filed submissions which is analyzed in the judgment. They also relied on the following authorities;
  - i. Section 51(2) of the *Advocates Act*.
  - ii. Order 7 of the *Advocates(Remuneration) Order*
  - iii. *Nyabena Alfred t/a Nyabena Nyakundi & Company Advocates v Tourism Promotion Limited t/a Serena Hotel* [2018] eKLR.

#### **Client/Respondent's Submissions.**

8. The respondent also filed submissions which is analyzed in the ruling. They also relied on the following authorities;
  - i. Section 51(2) *Advocates Act*.
  - ii. Rule 7 of the *Advocates Remuneration Order*.
  - iii. *Otieno Ragot & Co. Advocates v Kenindia Assurance Co. Ltd* [2020] eKLR Quoting The Case of *Jackson Omwenga & Co. Advocates vs Everest Enterprises Ltd* Nbi Misc. Appl. No. 96 of 1996.
  - iv. *Kitbi & Company Advocates vs Menengai Downs* [2015] eKLR.
  - v. *Otieno Ragot & Co. Advocates vs Kenya Airports Authority* [2021] eKLR.
  - vi. *Muema Kitulu t/a Muema Kitulu & Co. Advocates v County Govt of Kitui* [2020] eKLR.
  - vii. *Gideon Sitlu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR.
  - viii. *Z-U-DG vs SJK-U* [2021] eKLR.



## Analysis and Determination

9. I have considered the application, the replying affidavit, supplementary affidavit, the cited authorities, written submissions made and the relevant provisions of the Law.

## Issues

10. Issues for determination are: -
- i. Whether Narok High Court Misc. 2 of 2020 should be consolidated together with H.C.Com Misc. Application 3,6,4,5 all of 2020 for the purposes of this application.
  - ii. Whether the annexed certificates of taxation deemed to have been dully filed and endorsed upon payment of requisite court fees.
  - iii. Whether interest should be provided for at 14% per annum from April 11, 2020 until payment in full.

## Consolidation

11. The applicant submitted that parties are the same, and the issues are the same; therefore, this is a proper case for consolidation.
12. The respondent submitted that while the applicant is desirous to consolidate the applications, there are no separate applications for the court to look at and agree that they raise similar issues and thus consolidation cannot issue.
13. The principles for consolidation of suits are set out in the case of *Nyati Security Guards & Services Ltd v Municipal Council of Mombasa* (2000) eKLR where the court held as follows:
- “The situations in which consolidation can be ordered include where there are two or more suits for matters pending in the same court where:
- a) Some common question of law or fact arises in both or all of them;
  - b) The rights or reliefs claimed in them are in respect of or arise out of the same transaction;
  - c) For some other reason, it is desirable to make an order for consolidating them;
14. A perusal of the matters, shows that they relate to the same parties and the issues stem from the taxed bill of costs.
15. There is no difficulty or prejudice that may arise or suffered respectively, if the suits are consolidated.
16. Guided by: “The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it” (*Law society of Kenya vs. the Centre for Human Rights* Supreme Court Petition No. 14 of 2013); I order the consolidation as prayed.: -



## Certificates of taxation

17. The applicant submitted that once the taxing master issues a certificate of costs, there is nothing left. It is only for the court to give judgment on it where retainer is not in dispute as is the case in the present case.
18. The applicant further submitted that there being no dispute to retainer and the matters having been taxed all that is left is for the advocate/applicant to institute a procedural step and convert the taxation rulings into judgment and subsequently into decree capable of execution.
19. The respondent submitted that it does not oppose the conversion of the certificate of costs into judgment of this court to the extent that the certificates of taxation from the taxing officer are prima facie evidence of costs owing to the applicant. However, the client has made full payment of the taxed costs- payment of which has been duly acknowledged by the advocate.
20. Section 51(2) of the *Advocates Act*, Cap 16 Laws of Kenya provides: -

“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”. (Underlining mine)
21. On the other hand, Order 7 of the *Advocates (Remuneration) Order* provides that:

“An advocate may charge interest at 14 per cent 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, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.”
22. In *Nyabena Alfred t/a Nyabena Nyakundi & Company Advocates v Tourism Promotion Limited t/a Serena hotel* [2018] eKLR, the court held: -

“From the above provision, it is clear, and it is a rule of practice for advocates to file applications by way of notice of motion moving the court to enter judgment after taxation of their bills of costs and issuance of certificate of taxation. This procedure ensures expedition since the certificate of costs once issued is final as to the amount of the costs covered and what then remains is for the court to pronounce itself, on an application for judgment, where there is no dispute as to retainer, and order that judgment be entered for the sum of as per the certificate of costs”.
23. Accordingly, the Court gives judgment as per the certificate of costs as there is no dispute on the retainer
24. The annexed certificates of taxation shall be deemed to have been duly filed and endorsed upon payment of requisite court fees.
25. Nevertheless, the respondent stated that it had made full payment of the taxed bills- payments of which was acknowledged by the applicant on February 10, 2021. The respondent has annexed the copy of the confirmation of payment of Kshs. 399,502/=.
26. The applicant has not contested or denied the payment of the taxed costs in the certificates of taxation herein.



27. Thus, I find that the respondent paid the taxed bill.

### **Interest**

28. The applicant submitted that an advocate is entitled to charge interest at the rate of 14% per annum after the expiry of one month from the date of service of the bill upon the client. According to them, the bill of costs was served on March 11, 2020, thus, interest therefore starts running 30 days from March 11, 2020.
29. The respondent submitted that it is opposed to the grant of the claim for interest for the reason that there is no evidence placed before the court to back the claim of interest. Thus, the claim has no legal anchorage and the same must fail.
30. The respondent argued that the applicant has not led evidence with concise precision as to when the bill was delivered to the client. There is also no proof that the advocate made an unequivocal claim for interest in the bill prior to the full settlement of the bill as raised by the advocate.
31. The respondent further submitted that the evidence of service of the bill of costs provided by the applicant is an affidavit of service by Basil Malela, but the said affidavit is defective for want of signature by the deponent, a date and commissioning before a commissioner for oaths. They urged that it offends the provisions of the *Oaths and Statutory Declarations Act*.
32. According to the respondent without evidence of service on the client with the bill or block fee note as of March 11, 2020 the interest of 14% p.a. claim of interest is unsupported.
33. From the point of view of the law, an advocate is entitled to charge interest at the rate of 14% per annum after the expiry of one month from the date of service of the bill upon the client. The service of the bill does not necessarily mean the bill of costs, but it is the formal demand of the costs that are due to an advocate.
34. The applicant annexed an affidavit of service by Malela Basil as proof of service of the fee note or block bill of costs. Conspicuously missing from the so called 'affidavit of service' is the relevant jurat, signature and commission by a Commissioner for Oaths. An affidavit provides information under oath. The document before the court does not fit the description or character of an affidavit. It totally offends the provisions of the *Oaths and Statutory Declarations Act*. Accordingly, there is no evidence of service of the fee note or block bill of costs. More specifically, I find that there was no service of the bill on March 11, 2020 as alleged.

### **Conclusion and orders.**

35. On the basis of the foregoing findings, the Court finds and orders;
- i. The four (4) applications are hereby consolidated with the present application.
  - ii. The affidavit of service is improper and offends the *Oaths and Statutory Declarations Act*.
  - iii. The taxed bill is fully settled.
  - iv. The claim for interest is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS  
28TH DAY OF JUNE, 2022**

**F. GIKONYO M  
JUDGE**



**In the Presence of :**

**Muiruri for the Respondent**

**Nduati for Applicant - absent**

Mr. Kasaso - CA

