



Mokaya Ogutu & Co Advocates v African Merchant Assurance Company (Miscellaneous Civil Application 19 of 2019) [2021] KEHC 9776 (KLR) (16 April 2021) (Ruling)

Neutral citation: [2021] KEHC 9776 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
MISCELLANEOUS CIVIL APPLICATION 19 OF 2019**

JN ONYIEGO, J

APRIL 16, 2021

BETWEEN

MOKAYA OGUTU & CO ADVOCATES APPLICANT

AND

AFRICAN MERCHANT ASSURANCE COMPANY RESPONDENT

RULING

1. Vide a notice of motion dated November 19, 2019 filed pursuant to section 51 (2) of the [Advocates Act](#) cap 16 Laws of Kenya, rule 7 of the [Advocates Remuneration Order](#) and order 51 rule 1 of the [Civil Procedure Rules](#) 2010, the applicant sought orders as hereunder;
 1. That judgment be entered against the respondent/client in the sum of ksh 175,256
 2. That this honourable court be pleased to award interest at 14% on the taxed amount from 11th day of November, 2019 up to the date of payment
 3. That costs of this application and all incidental costs thereto be provided.
2. The application is premised upon grounds stated on the face of it and an affidavit in support sworn on November 19, 2019 by Kennedy Mokaya counsel practicing in the name and style of Mokaya Ogutu & Co. Advocates.
3. The applicant's case is that on June 11, 2014 the respondent instructed his law firm to enter appearance and defend the defendant in SPMCC No 80 of 214 Shallet Ndegwavs Mustapha Jamal & Shaban Mwabeo Mjai. As proof of the said instructions, he attached a letter marked KOM 2.
4. That despite defending the suit to conclusion and judgment entered in favour of the plaintiff, the respondent did not make any payment in settlement of their legal fees. He averred that, on 1st August, 2019 his law firm prepared and filed its Bill of Costs against the respondent.



5. The said Bill of Costs was taxed Ksh 175,252 and a certificate thereof duly drawn and served upon the respondent. A copy of the said certificate was attached and marked as annexure KOM-2. Besides the taxed amount, the applicant sought interest at 14% per annum commencing November 11, 2019 until full payment.
6. Despite service of the application as evidenced by the return of service, the respondent did not bother to file any response. Consequently, the applicant proceeded ex parte. When the matter came up for hearing, Mr Ratemo holding brief for Mokaya basically reiterated the averments contained in the affidavit in support and the attached authorities in respect of the case of *Nyaundi Tuiyott and Co Advocates v Africa Merchant Assurance Co Limited* in Nairobi, Misc Application No 77 of 2017.
7. From the foregoing, the application herein is not challenged. However, failure to oppose the application does not automatically mean that the application must succeed. See *Gideon Sitelu Konchellah v Julius Sunkuli Lekakeny and 2 others* (2018) e KLR where the court said

“Be that as it may, as a court, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the court will as a matter of course grant the sought orders”
8. The application herein is anchored on section 51(2) of the *Advocates Act* which provides that;

“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”
9. Besides the amount taxed, rule 7 of the *Advocates remuneration order* does make provision for payment of interest 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 it raised before the amount of the bill has been paid or tendered in full”.
10. From the evidence tendered, the defendant in the aforementioned case was duly represented by the applicants at the respondent’s request and therefore instruction. The applicant rendered its legal services as required. The respondent has not disputed or challenged this fact. A reference challenging the bill of costs has not been preferred. As it stands, it is only fair that the applicant gets its fair share of the requisite legal fees as provided by the law. Lawyers do not render charitable services unless offered on pro bono basis. A legal firm is a commercial enterprise which can only remain relevant and operational through rendering legal services for a fee lest it closes shop.
11. In the absence of any reference challenging the bill of costs, this court is enjoined to allow the application – See *Muema Kitulu and Co Advocates vs Obadia Kuvivya* Nairobi Misc case No 149 of 2011 where the court held that;

“It is by filing a reference by summons to a Judge that an aggrieved party can challenge a taxation and therefore a certificate of costs.



12. Similar position was held in *Alfred Ochieng Opiyo t/a Ochieng Opiyo Advocate vs Exparte Hydro pump and Services (Africa) Limited* (2018) e KLR where the court stated that ;

“The client stated in submissions before court that retainer was not disputed in this matter. That being so and because the court has declined to set aside the taxed costs, there is no reason why judgment should not be entered as prayed by the applicant.”

13. In view of my finding above, it is my holding that, the applicant has on a prima facie basis proved its case as required to warrant entry of judgment to the tune of the amount taxed at Ksh 175,252 together with interest at 14% calculated from the November 11, 2019 until full payment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 16TH DAY OF APRIL, 2021

J. N. ONYIEGO

JUDGE

