



**Mwangi Chege & Company Advocates v Kenya Broadcasting Corporation
(Miscellaneous Application 394 of 2015) [2021] KEHC 80 (KLR)
(Commercial and Tax) (23 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 80 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 394 OF 2015
GWN MACHARIA, J
SEPTEMBER 23, 2021**

BETWEEN

MWANGI CHEGE & COMPANY ADVOCATES APPLICANT

AND

KENYA BROADCASTING CORPORATION RESPONDENT

RULING

1. The application for consideration is the Applicant's Notice of Motion dated the 2nd November, 2020 brought under Sections 3A, 26 and 27 (2) of the Civil Procedure Act, Rule 7 of the Advocates Remuneration Order, 1962 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The Application seeks the following orders THAT:
 - a. The Taxed costs in the sum of Kshs 60,832,034/= be made the decree of the court.
 - b. The Respondent do pay interest on the taxed costs at the rate of 14% p.a from 15.9.2020 until payment in full.
 - c. The Respondent do pay the decretal sum in one lump sum.
 - d. The costs of this application be provided for.
2. The application is based on the grounds on the face of it and supported by the Affidavit of one MWANGI CHEGE, sworn on the 3rd day of November, 2020. The Applicant later filed a Further Affidavit sworn of 1st November, 2020. The Application was opposed by the Respondent vide a



Replying Affidavit sworn by DR. NAIM BILAL on the 20th November, 2020. The application was canvassed by way of written submissions.

The Applicant's Case

3. The Applicant avers that it filed its Bill of Cost dated the 16th day of February, 2015 which bill was eventually taxed by the court on 15th September, 2015 in the sum of Kshs. 60,832,034.00. The Applicant was subsequently issued with a Certificate of Taxation on the 8th October, 2020 for which he prays that the Court issues a decree as the Respondent has been reluctant to settle the same.
4. In support of its application, the Applicant filed a response to the issues raised by the Respondent in its affidavit sworn on the 20th day of November, 2020.
5. In its Further Affidavit, the Applicant states that issuance of a decree is a legal requirement that a party acting in good faith ought not to oppose. That the bid by the Respondent to stop it on the basis that it had made partial payments and intended to settle the same by way of installments was not acceptable as it (Applicant) sought lump sum payment of the same after negotiations to have the sum paid in four installments collapsed.
6. The Applicant further submitted that the penalty imposed by the Court on the Respondent of Kshs. 5,000,000.00 was payable within 45 days from the ruling of the 28th April, 2020 and it was not to be part of the payment towards the Applicant's costs.
7. On the issue of interest, the Applicant relied on the authority of *Otieno Ragot & Company Advocates v National Bank of Kenya Limited* [2016] eKLR where Majanja, J. held that:

“24. In my view the bill referred to in this rule is the Advocate's final bill setting out his disbursements and costs which he then requires the client to pay but not a bill which he intends to file for taxation.” Thus the fee note dated 24th April 2005 under cover of their letter of even date was sufficient to satisfy the provision of Rule 7 of the Order. No issue objection was raised on this issue by the respondent and I accordingly hold that the Advocates were entitled to interest at 14% per annum from 24th April 2005 when the issue of interest was actually raised.

25. As a result of the findings I have made, I allow the Advocates reference dated 30th November 2015 to the extent that the amount certified by the Deputy Registrar shall accrue interest at 14% per annum from 25th April 2005 until payment in full. The Client reference dated 14th December 2015 is dismissed.”

8. On basis of the foregoing authority, the Applicant asked the Court to order that the interests accrue from the date of re-taxation and not on the fee note.
9. The Applicant indicated it had no objection to the proposal by the Respondent that in the event that interests would be awarded, the same should be on the sums yet to be paid with respect to the Certificate of Taxation save that interest be computed from the dates the various payments were made for the same to be fair and equitable to the parties.

The Respondent's Case.

10. The Respondent, in its Replying Affidavit sworn on the 20th day of November, 2020 opposed the application and indicated that it had since made payments in the sum of Kshs. 335,504.00 being the uncontested items as well as Kshs. 5,000,000.00 pursuant to the ruling of the Court of the 28th April,



2020. The latter was to be paid pending re-taxation of the Bill of Costs. It is the Respondent's case that the foregoing sums ought to be deducted from the taxed costs of Kshs. 60, 832,034.00.

11. The Respondent further averred that it had approached the Applicant following the taxation ruling and intimated to it that it be allowed to settle the same by way of installments as it was financially struggling being an entity in the media industry which had been lacking funding from the National Treasury as a result of the Covid-19 pandemic which had greatly affected its business. It indicated that it had caused to pay the Applicant Kshs. 6,000,000.00 as a sign of good faith with respect to its proposition.
12. It was the Respondent's case that it would be unfair for the Applicant to have a decree in its favour to the tune of Kshs. 60,832,034.00 with the Respondent having paid a total of Kshs. 11,335,504.00 in settlement of the Applicant's costs.
13. It was further contested by the Respondent that the interest not having been set out in the Bill of Costs to warrant the determination of the taxing officer, the Court should exercise its discretion and deny the same as doing the converse would amount to reviving of the decision of the taxing officer. The Respondent urged the Court to dismiss the Application and allow its proposal to settle the costs in installments.
14. The Respondent underscored the court's observation in the ruling of 20th day of November, 2020 that, since 20 years had lapsed since the main suit was filed to the date of filing the Bill of Costs on 16th February, 2015, the Applicant/Advocate would be paid Kshs. 5,000,000/- upfront pending the re-taxation. In this regard, the Respondent urged the court to consider this sum as part of the advocate's reimbursement for the legal services rendered to the client. On this, reliance was placed on Section 51 (2) of the *Advocates Act*, Cap 16, Laws of Kenya which provides as follows: -

“The Certificate of the taxing master 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 costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where a retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

15. The Respondent urged the court to exercise its discretion and in issuing of a decree deduct the sums so far paid to the Applicant from the Certificate of Taxation.
16. On the issue of the date of interest, the Respondent submitted that the same ought to be on the net costs to the Applicant but should be compounded from 30 days after the date of the ruling of the taxation officer and not from the date of taxation as prayed by the Applicant. Reference was made to Rule 7 of the Advocates Remuneration Order which provides that: -

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

17. The Respondent urged the court to allow it pay the taxed costs in installments and the sums paid be excluded from the computation of interests.

Analysis and Determination

18. I have carefully considered the Applicant's application, the affidavit in support, the Replying Affidavit in response to the Application, the Further Affidavit and the rival submissions.



19. It is not disputed that the Respondent has since remitted sums to the tune of Kshs. 11,335,504.00 towards payment of its costs. The point of controversy in the Respondent's view is that, the Kshs. 5,000,000.00 ordered to be paid within 45 days of the ruling delivered on the 28th day of April, 2020 pending re-taxation of the Applicant's Bill of Costs was punitive. Further that, the sum should be considered as partial payment of costs to the Applicant. The Court did not expressly indicate whether the same was in partial payment of the costs to be later taxed or was throw-away costs per se.
20. My understanding of the intention of the Court was that the Respondent having taken over 20 years to settle the Applicant's costs, it awarded the same on an interim basis and hence would be deductible upon the Applicant's costs being re-taxed. I thus concur with the Respondent that the sums already paid should be deducted from the cost entitled to the Applicant. This accords with Section 51 of the Advocates Act which empowers the court to alter a Certificate of Costs in entering a judgment. For avoidance of doubt, the same provides as follows: -
- “The Certificate of the taxing master 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 costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where a retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.” (emphasis added).
21. The Respondent has objected to awarding of interests whilst intimating that if the same is to be awarded, it ought to be compounded on the unpaid sums in terms of costs to the Applicant 30 days from the date of the ruling pursuant to the provisions of Section 7 of the Advocates Act.
22. I find the argument advanced by the Respondent that the costs the Applicant is entitled to should not attract interests as the issue of interests was not raised in the Bill of Cost to be unpersuasive. In so finding I place reliance on the case of *Muri Mwaniki & Wamiti Advocates v John Ngigi Ng'ang'a & Another* [2014] eKLR in which the court held that:
- “My understanding of Rule 7 of the advocates Remuneration order is that interest is chargeable from the expiration of one month from delivery of the bill of costs by the advocate to the client. Evidence of delivery is necessary. To my mind, Rule 7 of the Advocates Remuneration Order does not refer to the certificate of costs but the bill of costs...The amount of the bill may be different from the taxed costs. But for all purposes of Rule 7, interest should be on the amount in the certificate of costs as those are the costs which are payable.”
23. However, I am in agreement with the Respondent that the computation of interest should be 30 days after the ruling on taxation was delivered. The re-taxation ruling having been delivered on the 15th day of September, 2020, the computation of interest ought to be from the 15th of October, 2020 on the outstanding sums on the Certificate of Taxation. The Respondent asked the Court to allow it to liquidate the Applicant's costs by way of installments. The proposal was abnegated by the Applicant as it found the terms offered by the Respondent did not match its demands.
24. It is trite law that a judgment debtor upon application and upon supplying Court with sufficient reasons can be allowed to liquidate the decretal sums by way of installments. Order 21 Rule 12 with respect to payment in installments provides:
- “(1) Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the



amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

- (2) After passing of any such decree, the court may on the application of the judgment debtor and with the consent of the decree-holder or without the consent of the decree holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor or the taking of security from him, or otherwise, as it thinks fit.”

25. In establishing what would amount to sufficient reason or what would move the Court to order that the Respondent pays the decretal sums in installments, I am guided by the principles laid down in the case of *Rajabali Alidina v Remtulla Alidina & Another* [1961] EA 565 which set out the following tests: -

- a. The circumstances under which the debt was contracted.
- b. The conduct of the debtor.
- c. His financial position, and
- d. His bona-fides in offering to pay a fair proportion of the debt at once.”

26. The debt arises from a taxation ruling which arose after the Applicant offered the Respondent legal services which said legal services were not paid for in over a decade and a half. This deprived the Applicant income so deserved. The delay on the part of the Respondent to pay the Applicant upon services being rendered prejudiced the Applicant.

27. Further, the Respondent failed to pay the sums as re-taxed in full and only paid the sum of Kshs. 6,000,000.00 on the 23rd October, 2020. Notably, the Applicant proposed to be paid approximately Kshs. 15,000,000.00 spread over four installments. The Respondent on the other hand claimed that it was struggling financially as a result of Covid-19 and offered payment in installments of Kshs. 12,000,000.00 spread over three installments.

28. I have taken note that the Respondent in its proposal to settle the sums in installments failed to account for how the balance on the Certificate of Taxation was to be paid upon settlement of the first Kshs. 12,000,000. I find that the proposal by the Respondent was not anywhere close to the Applicants expectations and there being no explanation as to how the same would be fully settled, I am of the opinion that the Respondent has failed to meet the test for being allowed to liquidate the decree in installments.

Deposition

29. For all the foregoing reasons, I am satisfied that the Application dated the 3rd day of November, 2020 is merited and I make the following orders: –

- a) THAT the Certificate of Taxation of the 15th day of September, 2020 be and is hereby altered.
- b) THAT Judgment is hereby entered against the Respondent in favour of the Applicant for Kshs. 49,496,530.00 as more particularly being the outstanding on the Certificate of Taxation dated the 15th day of September, 2020.



- c) Interest at court rates from the date of the 15th day of October, 2020.
- d) Costs of the application to the Applicant

30. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD SEPTEMBER, 2021.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

Mr. Chege Mwangi for the Applicant.

Ms. Nyabenge for the Respondent

